Supreme Court, U.S.
FILED

01 121 JUL 16 2001

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTMENTS LIMITED, formerly known as BRITISH AMERICAN TOBACCO COMPANY LIMITED; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE RESEARCH-USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.; UNKNOWN CORPORATIONS A-Z,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

[Counsel listed inside front cover]

Washington, D.C. • THIEL PRESS • (202) 328-3288

CAMDEN M. HALL
(Counsel of Record)

FOSTER PEPPER & SHEFELMAN
1111 Third Avenue, Suite 3400
Seattle, Washington 98101
(206) 447-4400

42pp

MICHAEL K. VASKA
CAMDEN M. HALL
(Counsel of Record)
BRADLEY BERG
ROBERT I. EATON
FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Telecopier: (206) 447-9700
Attorneys for Petitioners,
Association of Washington
Public Hospital Districts

I. QUESTIONS PRESENTED FOR REVIEW

1. Where petitioners have suffered injury in their business as a foreseeable result of respondents' conspiracy in violation of RICO and antitrust statutes, where petitioners are the first victims in the causal chain to suffer economic injury, and where no other proper plaintiff has been identified, do petitioners have standing to pursue RICO and antitrust claims against respondents?

2. Petitioner public hospital districts are required by statute to provide "charity" and other health care regardless of a patient's ability to pay. Respondent tobacco companies' conspiracy – in violation of RICO, the Sherman Act and state law – compelled the public hospital districts to provide millions of dollars in unreimbursed care that would not have been necessary "but for" the conspiracy. If petitioners were injured by defendants' conspiracy, must their claims be dismissed for lack of standing solely because of the absence of a "direct link" between defendants' wrongdoing and petitioners' damages?

3. In determining standing under RICO and antitrust statutes, is the availability of state law tort claims to other victims of defendants' conspiracy grounds for denying standing to a party under federal RICO and antitrust statutes, where denial of standing would leave no plaintiffs having standing to pursue these federal RICO and antitrust claims?

PARTIES

The following parties (collectively referred to in this petition as Public Hospital Districts or petitioners) were appellants below and are petitioners here: Association of Washington Public Hospital Districts, a Washington unincorporated association; Adams County Public Hospital District No. 2; Adams County Public Hospital District No. 3; Affiliated Health Services, a general partnership of Skagit County Public Hospital District No. 1 and Skagit & Whatcom Counties Public Hospital District No. 304; Chelan County Public Hospital District No. 2; Clallam County Public Hospital District No. 1; Clallam County Public Hospital District No. 2; Douglas, Grant, Lincoln, Okanogan Counties Public Hospital District No. 6; Ferry County Public Hospital District No. 1; Garfield County Public Hospital District; Grant County Public Hospital District No. 1; Grant County Public Hospital District No. 2; Grant County Public Hospital District No. 3; Grays Harbor County Public Hospital District No. 1; Jefferson County Public Hospital District No. 2; Kennewick Public Hospital District; King County Public Hospital District No. 1; King County Public Hospital District No. 2; Kittitas County Public Hospital District No. 1; Lewis County Public Hospital District No. 1; Mason County Public Hospital District No. 1; Okanogan and Douglas Counties Public Hospital District No. 1; Okanogan County Public Hospital District No. 3; Okanogan County Public Hospital District No. 4; Pacific County Public Hospital District No. 2; Pacific County Public Hospital District No. 3; Pend Oreille County Public Hospital District No. 1; Prosser Public Hospital District; Skagit County Public Hospital District No. 1; Skagit County Public Hospital District No. 2; Skagit and Whatcom Counties Public Hospital District No. 304; Snohomish County Public Hospital Dis-

trict No. 1; Snohomish County Public Hospital District No. 2; Snohomish County Public Hospital District No. 3; Whitman County Public Hospital District No. 1-A; and Whitman County Public Hospital District No. 3.

The following parties (collectively referred to in this petition as Tobacco Companies or respondents) were appellees below and are respondents here: Philip Morris Incorporated; RJ Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; British American Tobacco Plc; B.A.T. Industries PLC; British American Tobacco Investments Limited, formerly known as British American Tobacco Company Limited; Lorillard Tobacco Company; Liggett Group, Inc.; Liggett & Myers, Inc.; United States Tobacco Company; The Tobacco Institute Research-USA, Inc.; Smokeless Tobacco Council, Inc.; Hill & Knowlton, Inc.; Unknown Corporations A-Z.

CORPORATE DISCLOSURE STATEMENT

The Association of Washington Public Hospital Districts is an unincorporated association whose members – who are also petitioners – are municipal governments of Washington State. Because petitioners are nongovernmental corporations, there are no parent corporations to be disclosed under Rule 29.6.

Page

TABLE OF CONTENTS

I. Questions Presented For Review i

II. Table Of Contents iv

III. Table Of Authorities vi

IV. Opinions Below 1

V. Jurisdictional Statement 1

VI. Statutes Involved 2

VII. Statement Of The Case 3

A. Overview of the Case 3

B. Procedural History 6

VIII. Reasons For Granting The Writ 8

A. The Petition Raises an Important Federal Question About Standing for RICO and Antitrust Plaintiffs 8

1. This Petition Presents Questions of Great Importance to Potential Plaintiffs and Defendants in Future RICO and Antitrust Actions 9

2. The Impact on Tobacco Cases Alone Qualifies the Questions Presented as Important Federal Questions 10

B. The Lower Courts' Holdings Conflict with Decisions of This Court 14

1. With RICO and the Sherman Act, Congress Created Powerful Tools For Private Plaintiffs to Deter Unscrupulous Conduct 15

2. This Court's Proximate Cause Analysis Has Avoided Creating Bright-Line Tests

Page

or Situations Where RICO Violations Are Left Unremedied and Undeterred. 16

3. The Circuits Have Misapplied This Court's Analysis and Have Added Standing Requirements That Conflict with This Court's Decisions. 19

a. The Ninth Circuit Direct Link Test Creates a Bright-Line Standard Where This Court Has Declined to Create Such a Standard 19

b. The Ninth Circuit's Direct Link Test Conflicts with This Court's Holding in *NOW v. Scheidler* 20

c. Contrary to the Ninth Circuit, This Court Does Not Believe That Tort Claims Are an Adequate Substitute for RICO or Anti-trust Remedies 21

C. The Factors Previously Identified by this Court Weigh in Favor of Granting Standing to Petitioners 23

D. The RICO and Antitrust Standing Issues Have Divided Courts Throughout the Country. 27

IX. Conclusion 29

III. TABLE OF AUTHORITIES

Page

Cases:

Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429 (3d Cir. 2000) 10

Arkansas Blue Cross and Blue Shield v. Philip Morris, Inc., 1999 U.S. Dist. LEXIS 4573 (N.D. Ill. 1999), *reversed, Int'l Bhd. of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999)..... 28

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 79 F. Supp. 2d 1219 (W.D. Wash. 1999) 1, 6

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696 (9th Cir. 2000) 1, 3, 19, 22

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 7, 17, 20, 21, 23

Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560 (E.D.N.Y. 1999)..... 12

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 9, 26, 27

Bush v. Gore, 531 U.S. 98 (2000).....13

California v. ARC America Corp., 490 U.S. 93 (1989).....18

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 4, 12

Cases, continued: Page

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). 15

Florida v. American Tobacco Co., No. CL95-1466, slip op., 1996 WL 788371 (Fla. Cir. Court Dec. 13, 1996) 28

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). 9, 18

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). 9

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 7, 17, 18, 20, 21

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). 9, 18

Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999) 10, 28

Iron Workers Local Union No. 17 v. Philip Morris, Inc., 23 F. Supp. 2d 771 (N.D. Ohio 1998) 27

Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250 (7th Cir. 1995) 21

J. Truett Payne Co., v. Chrysler Motor Corp., 451 U.S. 557 (1981). 25

Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999) 10, 14

Lyons v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000) 10-11

Cases, continued: **Page**

Minnesota v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996) 28

Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 259 (1994) 9, 20

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999) 19

Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) 17, 27

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) 16

Pharmacare v. Caremark, 965 F. Supp. 1411 (D. Hawaii 1996) 21

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 774 (1987) 21

Sedima v. Imrex Co., 473 U.S. 479 (1985) 14

Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70 (D.D.C. 1999), *reversed*, 2001 WL 535977 (D.C. Cir. 2001) 9, 25, 27

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999) ..... *passim*

Tex. Carpenters Health Benefit Fund v. Philip Morris Inc., 199 F.3d 788 (5th Cir. 2000) 10

Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) 27

United Food and Commercial Workers Unions, Employers Health and Welfare Fund v.

Cases, continued: Page

Philip Morris, Inc., 223 F.3d 1271 (11th Cir. 2000) 10

United States v. Mitchell, 463 U.S. 206 (1983)..... 11

Statutes:

15 U.S.C. §1..... 3

15 U.S.C. §15(a)..... 3

18 U.S.C. §1962..... 2

18 U.S.C. §1964(c)..... 2

28 U.S.C. §1254(1) 1

28 U.S.C. §1331..... 4

28 U.S.C. §1332..... 3

28 U.S.C. §1337(a)..... 4

Pub. L. 91-451, §904(a), 84 Stat. 947 15

Other Authorities:

Marc Breslow, *Health Care Workers Confront Managed Care*, Dollars & Sense, January 1, 1999, 1999 WL 12230384 9

Christopher B. Durbin, *To Say the Greatest Matters in the Simplest Way: A First Economic Injury Rule as a Restatement of Directness Standing Requirements in Federal Antitrust Law*, 75 Wash. L. Rev. 549, 571 (April 2000)..... 29

Charles Lane, *Two Justices Defend Court's Intervention in Fla. Dispute*, Washington Post, March 30, 2001, at A13 13

Other Authorites, continued: **Page**

Stasia Mosesso, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War,* 76 Notre Dame L. Rev. 257, 259 (Nov. 2000) 14, 28

The Brown & Williamson Documents: Where Do We Go From Here? 274 JAMA 256, 258 July 19, 1995)..... 6

115 Cong.Rec. 6995 (1969) 16

W. Keeton, D. Dobbs, A. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §41, p. 264 (5th ed. 1984) 17

IV. OPINIONS BELOW

Petitioner Public Hospital Districts ask the Supreme Court to grant a Writ of Certiorari to the Ninth Circuit Court of Appeals to review the Ninth Circuit's decision (the Ninth Circuit Decision) dated February 22, 2001, captioned *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, No. 00-35117.

This action was originally commenced in the United States District Court for the Western District of Washington, captioned as Association of Washington Public Hospital Districts, *et al.*, v. Philip Morris Incorporaed, *et al.*, No. C98-1675. Defendants moved for dismissal of all of plaintiffs' claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On December 13, 1999, the district court granted defendants' motion to dismiss. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999).

Petitioners appealed. The Ninth Circuit affirmed. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696 (9th Cir. 2000). The Public Hospital Districts filed a petition for rehearing and rehearing en banc. The Ninth Circuit denied these requests on April 16, 2001. Copies of the Ninth Circuit Decision and related papers are included in the Appendix.

V. JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on February 22, 2001. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc on April 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

This petition concerns the Public Hospital Districts' claims brought under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Sherman Act. In pertinent part, RICO provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. 1962.

RICO provides a private cause of action with treble damages and attorneys fees for private attorneys general bringing such claims:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. 1964(c).

In pertinent part, the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. §1.

The Sherman Act also provides a private cause of action with treble damages and attorneys fees for private attorneys general:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15(a).

VII. STATEMENT OF THE CASE

A. Overview of the Case.

The Public Hospital Districts are political subdivisions of the state of Washington which are statutorily required to provide health care – including "charity care" – regardless of patients' ability to pay. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 700. Respondents are corporations not domiciled in the state of Washington which manufacture and market tobacco products or assist others in doing so. Petitioners filed suit against respondents in federal district court under 28 U.S.C. §1332 (diversity of citizenship), 28 U.S.C.

§1331 (federal question), and 28 U.S.C. §1337(a) (original question).

The Public Hospital Districts allege that over the last half century the Tobacco Companies have engaged in a pattern of extraordinary misconduct. The upshot of petitioners' allegations includes the following facts:

- respondents learned their products were both lethal and addictive decades earlier than smokers, health providers or others;
- respondents' own documents show they understood they were eseentially "in the business of selling nicotine, an addictive drug" and that removal of nicotine from the product would "eventually liquidate our business";
- less than three percent of the seventy percent of smokers who want to quit each year succeed, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 169 (2000) (Breyer, J., dissenting) (citing FDA findings);
- respondents understood, as a Brown & Williamson document put it, that "very few consumers are aware of the effects of nicotine, i.e., its addictive nature":
- respondents conspired to misrepresent and conceal the addictive nature of nicotine and the health risks associated with tobacco use;
- respondents conspired to suppress the creation of less harmful alternatives to their products (such as Nicorette gum and nicotine patches) in part because they feared development by hospitals and others of successful smoking cessation programs;
- respondents viewed health advice from medical providers, such as the Hospital Districts, and

effective smoking cessation products or other treatment programs, as direct competition;

- smoking causes lung cancer, emphysema, stroke, and other diseases and accounts for the premature death of more than 400,000 Americans annually;
- Public Hospital Districts are statutorily required to provide care – including "charity care" – to patients, without regard to patients' ability to pay;
- petitioners provided millions of dollars each year in unreimbursed care – above and beyond what they otherwise would have provided – as a result of respondents' misconduct;[1]
- respondents understood that proper use of their products would and did result in significant amounts of health care being rendered to smokers that otherwise would have been unnecessary; and
- respondents understood that some of this health care would be provided by entities such as petitioners, who would bear the expenses of such health care.

In short, respondents conspired to conceal that smoking is a disease of addiction (not merely a "bad habit" to be kicked) and to deny health providers such as the Public Hospital Districts the tools to treat this disease (e.g., Nicorette gum and nicotine patches). For decades, the conspiracy succeeded. As the editorial board of the

---

[1] Even as it dismissed similar claims of union welfare plans, the Third Circuit conceded, "At this point in contemporary history, there can be little doubt that the tobacco companies' products have caused smokers to contract certain illnesses and that the plaintiff Funds (and others) have borne some of the costs of these illnesses . . . ." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) ("*Steamfitters*").

Journal of the American Medical Association declared: "the evidence is unequivocal – the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence." *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 258 (July 19, 1995).

However, once the Public Hospital Districts learned that smoking was a disease and obtained the tools to treat it, they were able to begin lowering treatment costs. But for the conspiracy, the Public Hospital Districts would have treated patients for nicotine addiction years earlier, avoiding millions of dollars in treatment costs for smoking.

It is important to note that petitioners do not seek to stand in the shoes of smokers or to bring smokers' claims in some derivative capacity. **Petitioners seek damages only for care for which they were never reimbursed by smokers.** In other words, Public Hospital Districts are the first party in the causal chain who suffered the economic injury for which they seek compensation.

B. Procedural History.

Petitioners sought relief for respondents' misconduct under several different theories, including two RICO and two Sherman Act counts. Respondents moved for dismissal of all claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted respondents' motion. *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999).

Petitioners appealed and the Ninth Circuit affirmed, holding that they lacked standing to bring antitrist and RICO claims because their injuries were not proximately

caused by respondents' conduct. The court based this conclusion, as a threshold matter, on the lack of a "direct link" between respondents' misconduct and petitioners' injuries. After deciding that petitioners lacked standing on this ground alone, the Ninth Circuit "then applied the three-factor" test articulated by this Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") and *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and found that each of these factors weighed against granting standing to petitioner Public Hospital Districts. *Id.* at 702-703. The court also dismissed petitioners' remaining state law claims for lack of proximate cause. *Id.* at 707.[2]

The Ninth Circuit also dismissed petitioners' antitrust claims for failure to allege an antitrust injury. The court found that petitioners simply were not participants in the same market as the malefactors. *Id.* at 704-05. The court similarly dismissed petitioners claim under the Washington Consumer Protection Act, finding that petitioners had not been injured in their "business or property" within the meaning of that statute. *Id.* at 705-06 and that respondents' conduct had not proximate caused petitioners' injuries.

By holding that the Public Hospital Districts lack standing, the Ninth Circuit has now foreclosed the possibility that any party may hold tobacco defendants accountable for their RICO or antitrust violations. If this result stands, none of the logical parties in the chain

---

[2]Petitioners seek certiorari and reversal of the Ninth Circuit Decision on proximate cause as it relates to all of their claims. However, for the sake of consistency, petitioners will follow the Ninth Circuit's lead in discussing proximate cause only in the RICO and antitrust context.

of causation – smokers, direct health care providers or third-party payors – have standing to bring RICO or antitrust claims.

VIII. REASONS FOR GRANTING THE WRIT

A. The Petition Raises an Important Federal Question About Standing for RICO and Antitrust Plaintiffs.

However the Court resolves the issues presented in this case, the outcome will have sweeping ramifications. The impact on litigants and potential litigants in tobacco cases alone will be enormous.

More significantly, in clarifying – or declining to clarify – what approach should be used in determining standing under RICO and antitrust statutes, this Court's decision will have an impact that far transcends the tobacco litigation. Courts, potential private attorneys general, and potential RICO and antitrust defendants will know whether racketeers and conspirators can escape RICO and antitrust liability altogether in certain types of cases, no matter how foreseeable the harm to their victims.

If the record remains that Tobacco defendants' long-standing conspiracy in violation of RICO and the antitrust laws is beyond challenge because no party has standing, it will breathe new life into the observation of Mark Twain's character, Pudd'nhead Wilson: "A crime perservered [over a long time] ceases to be a crime, and becomes a virtue. This is the law of custom and custom supercedes all other law."

1. This Petition Presents Questions of Great Importance to Potential Plaintiffs and Defendants in Future RICO and Antitrust Actions.

This Court has played a very active role in shaping standing analysis under federal antitrust and RICO statutes[3] and has carefully avoided adopting a black-letter rule for determining proximate cause. Now the Ninth Circuit has boldly gone where this Court has declined to go, adopting what could be called the Direct Link Test: If there is anyone between plaintiffs and defendants in the causal chain of events, plaintifffs lack standing,[4] even if that intervening party itself cannot bring antitrust or RICO claims due to the nature of his or her injuries. Moreover, the Ninth Circuit has substantially altered this Court's analysis by equating state tort law claims with RICO and antitrust claims. Collectively, these holdings[5] fundamentally alter the proximate cause

---

[3] *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

[4] Such a rule has an especially onerous impact on the health care industry, which is the largest industry in the country, accounting for 13.5 percent of the Gross Domestic Product in 1999. Marc Breslow, *Health Care Workers Confront Managed Care*, Dollars & Sense, January 1, 1999, 1999 WL 12230384. Under the Direct Link Test, health providers' claims will be disproportionately penalized because their fact patterns usually involved third parties – patients. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

[5] While other circuits reached the same result as the Ninth Circuit by committing some of the same errors, the Ninth Circuit is the most explicit in establishing what amounts to a new bright-line test. *See Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999) *reversed*, 2001 WL 535977 (D.C. Cir. 2001) ("*Service Employees*"); *Lyons*

[footnote continued]

landscape – not just on tobacco litigation, but in any civil antitrust or RICO case brought by private attorneys general. Petitioners respectfully submit that such a dramatic shift in the law should occur only with this Court's review and approval.

The Ninth Circuit's new approach marks such a deviation from this Court's analysis that this Court should take this case, whether or not it disagrees with this new approach. If this Court agrees with the Ninth Circuit, this Court should take this case and explicitly endorse the Ninth Circuit's holding, since the standard articulated by the Ninth Circuit does not appear in any of this Court's previous decisions. Conversely, if this Court believes the circuits erroneously articulated standing requirements for RICO and antitrust statutes, it should take this case for the benefit of all those plaintiffs – in tobacco cases or otherwise – who will otherwise be denied the right to pursue their claims.

2. The Impact on Tobacco Cases Alone Qualifies the Questions Presented as Important Federal Questions.

RICO and antitrust standing ramifications aside, this is no ordinary case. The number of parties, magnitude of damages, and nature of the misconduct make this case worthy of this Court's attention.

---

v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) ("*Teamsters*"); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) ("*Laborers Local*"); *Steamfitters*, 171 F.3d 912 (3d Cir. 1999); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000).

Number of affected parties. The sheer number of similiarly situated plaintiffs and potential plaintiffs in tobacco cases is staggering. From unreimbursed public providers, such as the Public Hospital Districts, to payors of health care necessitated by respondents' conspiracy, literally thousands of entities have been injured in their business by respondents' conspiracy. The plaintiffs and potential plaintiffs include numerous[6] public entities, such as public hospital districts, municipalities, and even the federal government.[7] This Court's decision to correct or to tolerate the circuits' new approach to RICO and antitrust standing will have a profound impact on the rights of dozens of current plaintiffs and innumerable potential plaintiffs, including the federal government.

Magnitude of damages. The damages at issue in this case and related cases are colossal and virtually without precedent in American jurisprudence. State governments ultimately settled their claims against the Tobacco Companies for roughly $200 billion, *Steamfitters*, 171 F.3d at 918 (internal citation omitted), and they are responsible for paying only a fraction of the health care costs that were incurred as a result of respondents' conspiracy. This Court has taken the magnitude of damages into consideration when granting certiorari in other cases where much less was in dispute. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n.7

---

[6]Philip Morris's 10-Q dated May 12, 2000, states that as of May 1, 2000, there were approximately 50 health care cost recovery cases pending in the United States against Philip Morris. Plaintiffs in these actions include domestic and foreign governmental entities as well as non-governmental entities such as union health and welfare funds and Native American tribes.

[7]The federal government filed suit against the Tobacco Companies under RICO and other statutes on Sept. 22, 1999.

(1983) ("the damages claimed in this suit alone may amount to $100 million").

Nature of the misconduct. Finally, the nature of the alleged wrongs and harms warrants special consideration by this Court in determining whether to grant certiorari.

As one trial court noted:

> If the allegations are to believed, the defendants in this suit are responsible for one of the most colossal and reproachful frauds in the history of American society. If proven to be true, the allegations demonstrate that the defendants intentionally bargained away the lives and health of tens of millions of Americans for profit. While the law is forced to address allegations of malfeasance on a continual basis, rarely if ever have American courts been faced with allegations of fraud so nefarious in nature, so wide in scope, or so broad in impact.

Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999).

This Court has itself recognized that "the thousands of premature deaths that occur each year because of tobacco use" are "one of the most troubling public health problems facing our Nation today . . . ." *Food and Drug Admin. v. Brown & Williamson*, 529 U.S. at 125. Similarly, the Court acknowledges that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Id.* at 161. These deleterious health effects – and their attendant costs – could have been drastically reduced had respondents not illegally conspired and defrauded millions of people.

Of course, the unconscionable nature of respondents' underlying conduct does not alone mandate a legal remedy for every aggrieved party. The questions pre-

sented regarding standing under RICO and the Sherman Act are difficult. But as Justice Thomas testified recently before a congressional committee: "It is on difficult issues that the Court is required to be the Court." Charles Lane, *Two Justices Defend Court's Intervention in Fla. Dispute,* Washington Post, March 30, 2001, at A13. Justice Kennedy similarly testified: "Sometimes it is easy to enhance your prestige by not exercising your responsibility, but that's not been the tradition of our Court." *Id.*

Instead, the tradition of the Court has been to address difficult issues squarely, whatever the outcome. "When contending parties invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush v. Gore,* 531 U.S. 98 (2000) (per curiam). The parties have invoked the process of the courts, and the claimed wrongs and harms are of historic proportions.

The difficult question is ripe for this Court to decide: can the Tobacco Companies be held responsible under RICO and the Sherman Act for the billions of dollars in increased medical costs foreseeably created by their conspiratorial misconduct? The Ninth Circuit has held that individual smokers cannot bring antitrust and RICO claims because they have suffered only personal injuries, and that third-party payors (Union Trusts and Blue Cross/Blue Shield Plans) and direct health care providers (hospitals) cannot bring such claims because individual smokers intervene in the causal chain. Since the Public Hospital Districts are the last remaining plaintiff in the causal chain to have standing denied, the issue of whether any such party should have RICO or antitrust standing is now ripe.

B. The Lower Courts' Holdings Conflict with Decisions of This Court.

This Court has tread carefully through the minefield of proximate cause analysis,[8] deciding each case on its facts rather than slavishly employing any simple tests. Yet the Ninth Circuit has divined and adopted just such a test – the Direct Link Test. Furthermore, the Ninth Circuit Decision misapplied factors previously identified by this Court by equating tort claims with RICO and antitrust claims.

The result of the Ninth Circuit's approach is a sieve so fine that every potential plaintiff has now been screened out. Notwithstanding claims that constitute RICO and Sherman Act violations of historic proportions, the Ninth Circuit has held that no plaintiff – not smokers, not direct health care providers, not third-party payors – has standing to bring RICO and antitrust claims. In effect, "the result [of the Ninth Circuit's tobacco decisions] was the court leaving a very real injury unremedied and immunizing extremely culpable defendants." Stasia Mosesso, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 Notre Dame L. Rev. 257, 259 (Nov. 2000). This surreal scenario – one never before created by this Court's decisions – underscores that something has gone fundamentally wrong in the lower courts' standing analysis.

To demonstrate how the Ninth Circuit Decision conflicts with those of this Court, it is helpful to review

---

[8] "Any discussion of proximate cause should be approached with some trepidation because, as a scholarly treatise teaches, no topic is subject to more disagreement or such confusion." *Laborers Local*, 191 F.3d at 235 (internal citations and quotations omitted).

briefly (1) the congressional intent in enacting RICO and federal antitrust statutes, (2) this Court's standing rulings, and (3) the Ninth Circuit's standing analysis.

1. With RICO and the Sherman Act, Congress Created Powerful Tools for Private Plaintiffs to Deter Unscrupulous Conduct.

Much like the Ninth Circuit Decision, some circuits initially viewed the ability of private litigants to bring RICO claims quite narrowly. For example, one lower court believed that RICO was not intended to "provide additional remedies for already compensable injuries." *Sedima v. Imrex Co.*, 473 U.S. 479, 483 (1985) (quoting 741 F.2d 482, 494 (2d Cir. 1984)) (emphasis added). This Court disagreed:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity . . . . RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.

Id. at 497-98 (internal citations omitted).

Similarly, in creating private causes of action with treble damages under the antitrust statutes, Congress provided a means "not merely to compensate those who have been directly injured but also *to vindicate the important public interest in free competition.*" *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-02 (1969) (emphasis added). In language that

sounds almost prescient of the present case, this Court thus warned of

> the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. . . . *[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.*

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-39 (1968) (emphasis added).[9]

2. This Court's Proximate Cause Analysis Has Avoided Creating Bright-Line Tests or Situations Where RICO Violations Are Left Unremedied and Undeterred.

Notwithstanding the sweeping language and broad remedial nature of RICO and the Sherman Act, this Court has recognized limits to the statutes' reach. In

---

[9] While both statutes are to be read broadly, certain legislative history suggests RICO should be construed even more broadly than the Sherman Act. RICO was originally introduced, in part, as an amendment to the Sherman Act. However, the Antitrust Section of the American Bar Association prepared a report on the proposed legislation "endorsing the principles and objectives" of the legislation, "but recommending that any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law." The ABA's recommendation, which was followed by Congress in enacting RICO, was based in part on concerns that private litigants proceeding under antitrust statutes would encounter "inappropriate and unnecessary obstacles" from "*a body of precedent – appropriate in a purely antitrust context – setting strict requirements on questions such as "standing to sue" and "proximate cause.*" 115 Cong. Rec. 6995 (1969) (ABA comments on S. 2048) (quoted in part in *Sedima*, 473 U.S. at 498).

particular, the Court has found that only those plaintiffs whose injuries were proximately caused by defendants' violation of these statutes have standing. *See, e.g., Holmes,* 503 U.S. at 265-66, 268.

Lack of bright lines. What is striking in reviewing this Court's leading decisions on proximate cause and standing is the calculated absence of any bright-line standard or strictly defined formula:

> [T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

AGC, 459 U.S. at 536 (quoted in part in *Holmes,* 503 U.S. at 274 n.20).

Balancing justice and administrative practicality. Ultimately, the factors identified by this Court faciliate the task of balancing of justice and administrative practicality: "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' *Holmes,* 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984). Or as Justice Andrews candidly put it in his famous *Palsgraf* dissent: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 351-52, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (quoted iwth approval by *AGC,* 459 U.S. at 537 n.34).

The search for proper plaintiffs. In applying the concepts of justice, public policy, and administrative practicality in the context of RICO and antitrust law, this Court has searched for the "proper plaintiffs," *see, e.g., Holmes,* 503 U.S. at 274, but has "*never* ruled that a plaintiff's injuries are too remove without first identifying a plaintiff who was more directly injured and better able to vindicate the law as a private attorney general." *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 86 (D.D.C. 1999), *reversed*, 2001 WL 535977 (D.C. Cir. 2001) ("*Service Employees*").

The point of sifting out some plaintiffs has been to preserve the potency of RICO and antitrust claims – not to render them impotent by denying standard to all potential RICO and antitrust plaintiffs. For example, "*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute – Section 4 of the Clayton Act – would result in no one plaintiff having a sufficient incentive to sue under that statute." *California v. ARC America Corp.*, 490 U.S. 93, 104 (1989) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). Similarly, in *Hanover Shoe*, this Court recognized standing for a shoe manufacturer where it feared that individual consumers

> would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopoloizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

392 U.S. 481, 494 (1968).

3. The Circuits Have Misapplied This Court's Analysis and Have Added Standing Requirements That Conflict with This Court's Decisions.

a. The Ninth Circuit Direct Link Test Creates a Bright-Line Standard Where This Court Has Declined to Create Such a Standard.

The Ninth Circuit has taken the concept of directness quite literally. In ruling on the Public Hospital Districts' claims, the Ninth Circuit looked to its ruling in *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), which it summarized in this way:

> [T]he trusts' injuries were entirely derivative in nature, for "without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." Thus, *there was no "direct link" between the defendants' alleged wrongdoing and the trusts' damages, and the proximate cause requirement was not met.*

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 702 (9th Cir. 2000) (quoting *Oregon Laborers*, 185 F.3d at 964) (emphasis added). Only after concluding plaintiffs lacked standing based on the absence of a "direct link" alone did the lower court turn to the factors identified by this Court in *AGC* and *Holmes* – almost as an afterthought. *Id.* ("We then applied the three-factor AGC/Holmes proximate cause test").

The Ninth Circuit's test creates an appealingly bright line: If there is anyone between plaintiffs and defendants in the causal chain of events, plaintiffs lack standing.

This is true, even if plaintiffs are the first victim in the causal chain to suffer cognizable RICO and antitrust economic injuries. Had this Court adopted such a bright-line approach, it could have saved itself much of the analysis set forth in *Holmes* and *AGC*. Instead, as discussed above, this Court declined to "announce a black-letter rule . . ." and focused instead on identifying factors that should guide lower courts' analysis. *AGC*, 459 U.S. at 536. Noting that "[s]ome courts have focused on the directness of the injury," this Court cautioned against mechanical application of the very notion on which the Ninth Circuit has now seized: "In our view, courts should analyze each situation in light of the factors set forth in the text *infra*." *AGC*, 459 U.S. at 537 n.33; *cf. Holmes*, 503 U.S. at 274 n.20 ("our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text").

b. The Ninth Circuit's Direct Link Test Conflicts with This Court's Holding in *NOW v. Scheidler*.

Not only has this Court eschewed the kind of black-letter rule created by the Ninth Circuit, but its holdings clearly conflict with such a rule. In *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*NOW*"), for example, plaintiffs' RICO claims hinged on the fact that defendants' conduct had an impact on others (patients and employees of the clinic), whose conduct harmed plaintiff in its business. If defendants are the first link in the causal chain in *NOW*, patients and employees of the clinics are clearly the second link. The plaintiff clinics are relegated to the status of third link, connected to defendants only by the impact defendants'

conduct had on patients and employees, whose reaction to defendants' conduct resulted in foreseeable harm to plaintiff clinics.

Under the Ninth Circuit's Direct Link Test, the plaintiff clinic's claim in *NOW* would be quickly and easily dismissed: there is no "direct link" between defendants' wrongdoing and plaintiff's harm. The same is true of a number of other cases in which lower courts have granted standing to indirectly injured plaintiffs. *See, e.g., Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) (Easterbrook, J.) ("there is no doubt that a producer injured by a campaign of misinformation directed at its customers suffers an injury compensible under the laws of torts"); *Pharmacare v. Caremark*, 965 F. Supp. 1411, 1421 (D. Hawaii 1996) (outpatient therapy center had standing to bring RICO claims for injuries it suffered as a result of a competitor's illegal efforts to obtain patient referrals; "Defendants' alleged perpetration of fraud on its patients could foreseeably affect the Plaintiffs"); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774 (1987) (although "a loss of consortium action is dependent on the occurrence of an injury to another, the claimant suffers an original injury that is the subject of the action").

c. Contrary to the Ninth Circuit, This Court Does Not Believe That Tort Claims Are an Adequate Substitute for RICO or Antitrust Remedies.

Compounding its error, when the Ninth Circuit finally considered the *AGC/Holmes* factors, it misapplied this Court's analysis. This Court has looked to whether there are more directly harmed victims who can and will

bring *RICO or antitrust claims.* The Ninth Circuit looked to whether there were more directly harmed victims who could bring *any kind of claim at all,* thus completely blurring the distinction between RICO or Sherman Act claims and garden-variety tort claims.

The Ninth Circuit denied standing to petitioners, in part,

> because there existed more directly injured victims, in the form of the smokers themselves, who would be motivated to punish the defendants for their wrongdoing. . . . *Although smokers could not vindicate the public interest in antitrust [or RICO] enforcement, they could bring other claims to deter the defendants' wrongdoing.*

Ass'n of Wash. Pub. Hosp. Dists., 241 F.3d at 702 (quoting *Oregon Laborers* at 964) (internal citations omitted) (emphasis added).

In considering the standing of plaintiffs under RICO and antitrust statutes, this Court has never considered the availability of tort claims to other plaintiffs, but has instead looked for more directly injured victims "whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement . . . ." *AGC,* 459 U.S. at 542. Conversely, because the Ninth Circuit implicitly equates tort claims with RICO and antitrust claims, it is comfortable with a result that leaves no plaintiffs with standing to pursue RICO or antitrust claims.

Petitioners respectfully submit that the Ninth Circuit is fundamentally mistaken on this point: tort claims will not do just fine. This Court should take this case to clarify that the availability of *tort actions* to other more directly affected victims of defendants' conduct is not grounds for denying standing to a party who sustained *RICO or antitrust injuries.* Particularly where denial of

standing on such grounds leaves no plaintiff to pursue RICO or antitrust claims, the result is antithetical to both this Court's holdings and congressional intent. The Ninth Circuit's approach leaves RICO and antitrust wrongs unremedied,[10] leaving individuals to pursue tort claims on a piece-meal basis. The tobacco cases dramatically demonstrate the inadquacy of such remedies in comparison to the remedies enacted by Congress for RICO and antitrust wrongs.

C. The Factors Previously Identified by this Court Weigh in Favor of Granting Standing to Petitioners.

Proper application of this Court's analysis weighs in favor of granting standing to the petitioner Public Hospital Districts:

Availability of other plaintiffs. The Ninth Circuit has made it clear that no other plaintiffs – not smokers, not third-party payors, not direct health care providers – are available to bring RICO or antitrust claims against respondents for their conspiracy to suppress the knowledge that smoking is a disease of addiction and the development of tools to treat it. The availability of tort claims to individual smokers is not a substitute for the potent remedy available to RICO and antitrust plaintiffs.

Difficulty in apportioning damages. In the present case there should be no difficulty whatsoever in apportioning damages because petitioners seek compensation only for health care actually provided for which smokers have not already reimbursed them. Indeed, the Ninth

---

[10] By contrast, this Court has been concerned about leaving "a significant antitrust violation undetected or unremedied . . . ." *AGC*, 459 U.S. at 542.

Circuit's suggestion that there would be difficulty in apportioning damages among plaintiffs is curious given its ruling that no plaintiffs have standing to bring RICO or antitrust claims against respondents. Even the Third Circuit, which dismissed payors' claims, found that there is "little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." *Steamfitters*, 171 F.3d at 928.

If there were any concern that petitioners' claims might result in duplicative recovery, such concerns are obviated by a clause in the Master Settlement Agreement between the states and respondents. Under this clause, respondents conceded in trial court briefs, any of petitioners' recoveries would come out of the fixed amount of Washington State's recovery. However, under the terms of that agreement, petitioners recover nothing unless they are found to have standing and ultimately recover on their claims.

On this particular point, the Public Hospital Districts note that their claims are not based on mere contractual obligations to pay for care provided by others. Judge Easterbrook of the Seventh Circuit noted:

> The [Union Trust] Funds and the Blues [Blue Cross/Blue Shield Plans] are just financial intermediaries. They collect the premiums and spend them to provide the contracted-for care; their books balance whether the costs of care are high or low. Smokers, employers, and other purchasers of insurance, not the Funds and the Blues, foot the medical bill in the end.

Teamsters, 196 F.3d at 824. By contrast, petitioners are health care providers statutorily required to provide care directly to patients from whom they did not receive compensation. Moreover, the Public Hospital Districts'

injuries were directly the result of tobacco defendants' conspiracy to suppress development of smoking cessation programs.

Difficulty in ascertaining damages. Having collusively deceived the world for decades about the addictive nature of their product, the Tobacco Firms now contend that the PHDs and others may not recover damages because it is too difficult to ascertain the precise among of damages in question:

> [t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But . . . it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 566-67 (1981) (citations omitted).

Foreseeability. The foreseeability of petitioners' harm strongly weighs in favor of granting standing. For many years respondents have known all too well precisely what the gruesome consequences of their ongoing misconduct would be:

> The foreseeable consequences of such conduct are obvious. Millions of people will develop the vast array of pulmonary, cardiovascular, and malignant conditions that Plaintiffs have alleged in their complaint. Those conditions will make extraordinary demands on the healthcare community.

Service Employees, 83 F. Supp. 2d at 85. Indeed, some of the respondents concluded that "costs associated with smoking and health are not social costs but transfer payments." Similarly, a Philip Morris document warned that "as health care costs rise astronomically, the oppo-

sition becomes armed with more potent weapons." *Steamfitters*, Petition for Certiorari at 8. Respondents also viewed health care providers such as petitioners as competition, since they knew effective smoking cessation programs could undermine their stranglehold on their customers.

Indeed, once the Public Hospital Districts learned smoking was a disease of addiction to be treated, and obtained the tools to treat it, they deployed smoking cessation programs. These programs, in turn, reduced the amount of care required to treat smoking illness. But for tobacco defendants' conspiracy, the Public Hospital Districts would have created such programs years earlier, and thus avoided millions of dollars in tobacco-related treatments.

Antitrust injury. Finally, the Ninth Circuit also dismissed petitioners' antitrust and Washington Consumer Protection Act ("CPA") claims on the ground that petitioners suffered no antitrust injury or injury to their business within the meaning of the CPA. Yet this case is remarkably similar to *McCready*, where the district court also denied standing on the grounds that plaintiff's injury was too "indirect and remote to be considered 'antitrust injury.' " *McCready*, 457 U.S. at 470-71. This Court disagreed with the district court's dismissal:

> The harm to McCready and her class was clearly foreseeable . . . . [T]here can be no question but that the loss was precisely "the type of loss that the claimed violations would be likely to cause."
>
> . . .
>
> Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators

> sought to inflict on psychologists and the psychotherapy market.

Id. at 479 (internal citations omitted).

Considered together, these factors strongly weigh in favor of finding that respondents' misconduct proximately caused injury to petitioners.

D. The RICO and Antitrust Standing Issues Have Divided Courts Throughout the Country.

No explicit conflict exists among the circuits on the questions presented. That is the only judicial level at which an explicit conflict on these issues does not exist.

Numerous federal district courts have reached contrary conclusions than the circuit courts. For example, the District Court for the District of Columbia concluded:

> If Plaintiffs can ultimately prove their allegations, can there really be any doubt that sound public policy demands that they be given an opportunity to do so? To close the courthouse door to them, in light of the magnitude of the harm alleged and the moral turpitude of the conduct alleged, would be a far cry from the "rough sense of justice" that Justice Andrews recognized as part of the proximate cause equation so long ago in *Palsgraf.*

Service Employees, 83 F. Supp. 2d at 84-85 (footnotes and internal citations omitted), *reversed,* 2001 WL 535977, *5, *7-*8 (D.C. Cir. 2001) (relying in part on the Ninth Circuit's analysis). *See also Texas v. American Tobacco Co.,* 14 F. Supp. 2d 956, 968 (E.D. Tex. 1997) ("having considered the concerns of *Holmes,* the policy underlying the requirement of proximate cause, and the nature of this suite as a whole, the injury allegedly incurred by the State is not sufficiently remote to warrant dismissal"); *Iron Workers Local Union No. 17 v.*

Philip Morris, Inc., 23 F. Supp. 2d 771, 791 (N.D. Ohio 1998) ("plaintiffs' injuries are distinct from the personal injury claims of smokers. Plaintiffs have sufficiently stated RICO's injury element"); *Arkansas Blue Cross and Blue Shield v. Philip Morris, Inc.*, 1999 U.S. Dist. LEXIS 4573 at *6 (N.D. Ill. 1999), *reversed, Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999) (plaintiffs are only ones who "can claim the injury to business or property required by the RICO statute").

Many state courts that have opined on the questions presented here also conflict with the holdings of the federal circuit courts. For example, one Florida trial court declared that the allegations at the heart of this lawsuit "would seem to make out a case for 'the mother of all RICO actions.' " *Florida v. American Tobacco Co.*, No. CL95-1466, slip op., 1996 WL 788371, *4 (Fla. Cir. Court. Dec. 13, 1996). The Minnesota Supreme Court recognized standing under a somewhat broader state antitrust statute, but noted that it would have found standing "[e]ven absent the statutory grant of authority in the antitrust statute." *Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 497 n.1 (Minn. 1996). Although the specific nature of some of the states' claims differs, numerous state courts found the states had standing to sue for at least some cause of action, despite the absence of a "direct link" between defendants' conduct and plaintiffs' harm. *See Steamfitters*, 171 F.3d at 937-38 (appendix summarizing decisions).

Commentators have also harshly criticized the circuit court decisions. According to one author, "[T]he circuits courts are engaging in an improper proximate cause analysis by . . . misapplying the policy-based methodology to deselect all plaintiffs instead of to select the best enforcer of RICO." Notre Dame L. Rev.

at 259. Another contends the decisions of the Ninth Circuit and its counterparts "essentially applied an artificial privity requirement unsupported by precedent." Christopher B. Durbin, *To Say the Greatest Matters in the Simplest Way: A First Economic Injury Rule as a Restatement of Directness Standing Requirements in Federal Antitrust Law*, 75 Wash. L. Rev. 549, 571 (April 2000).

Finally, this Court should take judicial notice of the practical conflict these divergent opinions have created: states (including the state of Washington), recovered billions of dollars through their litigation, while entities such as petitioners (political subdivisions of the state of Washington with separate legal standing) — who collectively incurred even great costs — have been judicially barred from recovering any relief. Consequently, such entities are justified in asking whether they are truly so differently situated from state payors that they do not deserve a day in court.[11]

IX. CONCLUSION

Whether the Tobacco Companies have wrought some terrible injustices on our society is a relatively easy question. The more difficult questions are whether the federal judiciary system is the forum and whether public providers are suitable plaintiffs for remedying those

[11] The Third Circuit acknowledged that there is "arguably a tension between our decision here that the tobacco companies cannot be held liable for the damages suffered by entities that paid for smoking-related illnesses, and the fact that these same tobacco companies recently agreed to pay more than $200 billion to settle claims brought by attorneys general for the states' similar costs of their citizens' smoking-related illnesses." *Steamfitters*, 171 F.3d at 934 n.18.

injustices. It may be tempting to evade these issues – to conclude that there has been enough litigation, that the states have obtained their pound of flesh and it is time to move on – without this Court ever weighing in on the questions.

But Justice Thomas and Justice Kennedy suggest that is not the tradition of this Court. It is when this Court addresses such difficult questions squarely that it is "truly the Court." When the first party to suffer cognizable RICO and antitrust injuries is not the first victim in the causal chain, does no one have standing to pursue relief under these potent federal statutes? When some of this nation's most powerful corporations conspire and defraud in a way that results in millions of deaths and billions of dollars in corresponding health care costs, are we willing to rely on tort suits by individuals to deter the racketerring and conspiratorial misconduct prohibited by RICO and the Sherman Act? Was Mark Twain right when he observed, through his other character Tom Sawyer: "The wronger a conspiracy is, the better it is?"

These are difficult quetions. These are questions worthy of this Court's review.

Respectfully submitted,

MICHAEL K. VASKA
CAMDEN M. HALL
BRADLEY BERG
ROBERT I. EATON
FOSTER PEPPER
& SHEFELMAN
1111 Third Avenue
Suite 3400
Seattle, Washington 98101
(206) 447-4400
Attorneys for Petitioners.

July 16, 2001

FILED

01 121 JUL 16 2001

OFFICE OF THE CLERK

(2)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTMENTS LIMITED, formerly known as BRITISH AMERICAN TOBACCO COMPANY LIMITED; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE RESEARCH-USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.; UNKNOWN CORPORATIONS A-Z,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

[Counsel listed inside front cover]

Washington, D.C. • THIEL PRESS • (202) 328-3366

CAMDEN M. HALL
(Counsel of Record)

FOSTER PEPPER & SHEFELMAN
1111 Third Avenue, Suite 3400
Seattle, Washington 98101
(206) 447-4400

190 pp

MICHAEL K. VASKA
CAMDEN M. HALL
(Counsel of Record)
BRADLEY BERG
ROBERT I. EATON
FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Telecopier: (206) 447-9700
Attorneys for Petitioners,
Association of Washington
Public Hospital Districts

TABLE OF CONTENTS

Page

APPENDIX A – Second Amended Complaint (July 2, 1999) 1a

APPENDIX B – District Court Order Granting Motion to Dismiss (December 13, 1999) 148a

APPENDIX C – Ninth Circuit Opinion (February 22, 2001) 169a

APPENDIX A

[Filed JUL 02 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C98-1675

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association;

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2;

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 3;

AFFILIATED HEALTH SERVICES, a general partnership of Skagit County Public Hospital District No. 1 and Skagit and Whatcom Counties Public Hospital District No. 304;

CHELAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 2;

CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 1;

CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 2;

DOUGLAS, GRANT, LINCOLN, OKANOGAN COUNTIES PUBLIC HOSPITAL DISTRICT NO. 6;

FERRY COUNTY PUBLIC HOSPITAL DISTRICT NO. 1;

GARFIELD COUNTY PUBLIC HOSPITAL DISTRICT;

GRANT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

GRANT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

GRANT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 3;

GRAYS HARBOR COUNTY
PUBLIC HOSPITAL DISTRICT NO. 1;

JEFFERSON COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

KENNEWICK PUBLIC HOSPITAL DISTRICT;

KING COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

KING COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

KITTITAS COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

LEWIS COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

MASON COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

OKANOGAN COUNTY PUBLIC
HOSPITAL DISTRICT NO. 3;

OKANOGAN COUNTY PUBLIC
HOSPITAL DISTRICT NO. 4;

OKANOGAN AND DOUGLAS COUNTIES
PUBLIC HOSPITAL DISTRICT NO. 1;

PACIFIC COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

PACIFIC COUNTY PUBLIC
HOSPITAL DISTRICT NO. 3;

PEND OREILLE COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

PROSSER PUBLIC HOSPITAL DISTRICT;

SKAGIT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

SKAGIT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

SKAGIT AND WHATCOM COUNTIES
PUBLIC HOSPITAL DISTRICT NO. 304;

SNOHOMISH COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1;

SNOHOMISH COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2;

SNOHOMISH COUNTY PUBLIC
HOSPITAL DISTRICT NO. 3;

WHITMAN COUNTRY PUBLIC
HOSPITAL DISTRICT No. 1-A; and

WHITMAN COUNTY PUBLIC
HOSPITAL DISTRICT NO. 3,

Plaintiffs

v.

PHILIP MORRIS INCORPORATED;

R.J. REYNOLDS TOBACCO COMPANY;

BROWN & WILLIAMSON TOBACCO CORPORATION;

BRITISH AMERICAN TOBACCO P.L.C.,

B.A.T INDUSTRIES P.L.C;

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED (formerly known as BRITISH-AMERICAN TOBACCO COMPANY LIMITED);

LORILLARD TOBACCO COMPANY;

LIGGETT GROUP, INC.;

LIGGETT & MYERS, INC.;

UNITED STATES TOBACCO COMPANY;

THE TOBACCO INSTITUTE, INC.;

THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.;

SMOKELESS TOBACCO COUNCIL, INC.;

HILL AND KNOWLTON, INC.; and

UNKNOWN CORPORATIONS A-Z,

Defendants.

SECOND AMENDED COMPLAINT
(JURY DEMAND)

TABLE OF CONTENTS

I. NATURE OF THIS ACTION. . . . . .

A. Summary of Plaintiffs' Claims . . . . . .

B. Nature of Plaintiffs' Business . . . . . .

II. JURISDICTION AND VENUE. . . . . .

III. THE PARTIES . . . . . .

A. Plaintiffs . . . . . .

B. Defendants . . . . . .

IV. THE DEFENDANTS' CONSPIRACY . . . . . .

A. The Health Consequences of Tobacco . . . . . .

B. Industry Concentration . . . . . .

C. Overview of Defendants' Wrongful Conduct and Conspiracy . . . . . .

D. The Tobacco Companies' Ongoing Public Deception About Smoking and Health . . . . . .

E. The Tobacco Companies' Concpiracy Began in Earnest in Order To Counter a Public Health "Scare" Over Tobacco . . . . . .

F. The Tobacco Companies Undertook a Duty To Investigate and Tell the Truth About the Adverse Effects of Smoking, But Repeatedly Lied to the Public and Governmental Agencies, Breaching This Duty . . . . . .

G. Defendants Have Known for at Least Four Decades That Cigarettes and Other Tobacco Products Were Deadly and Addictive and That Tobacco Products and Defendants' Wrongful Conduct Would Increase Plaintiffs' Health Care Services Costs . . . . . .

H. TIRC and CTR Were Tobacco Industry Controlled Propaganda Machines Used in Furtherance of the Conspiracy and Not "Independent" Scientific Research Councils as Fraudulently Misrepresented by the Industry . . . . .

I. Defendants Fraudulently Hid, Concealed, and Destroyed Research . . . . .

J. Defendants Misrepresented Health Claims . . . . .

K. The Conspiracy To Suppress Research and Product Development of Less Harmful or Less-Addictive Tobacco Products . . . . .

L. Suppression of Less Harmful Cigarettes Pursuant to the Conspiracy . . . . .

M. Defendants Manipulated Nicotine To Assure Addiction . . . . .

N. Defendants Continue To Fraudulently Conceal Their Manipulation of Nicotine . . . . .

O. Defendants Targeted Children, the Poor and Minorities . . . . .

P. Defendants Fraudulently Concealed Their Misconduct . . . . .

Q. The Tobacco Industry Must Be Held Accountable . . . . .

R. New Evidence of Wrongful Conduct Is Emerging . . . . .

V. CLAIMS FOR RELIEF . . . . .

COUNT 1 VIOLATION OF THE SHERMAN ACT (15 U.S.C. §1) . . . . .

COUNT 2 VIOLATION OF THE SHERMAN ACT (15 U.S.C. §1) . . . . .

COUNT 3 VIOLATION OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (18 U.S.C. § § 1962(C) and 1962 (D)) .....

COUNT 4 VIOLATION OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (18 U.S.C. § § 1962(A) and (D)).....

COUNT 5 FRAUDULENT MISREPRESENTATION .....

COUNT 6 FRAUDULENT CONCEALMENT.....

COUNT 7 BREACH OF SPECIAL DUTY.....

COUNT 8 UNJUST ENRICHMENT .....

COUNT 9 CONSPIRACY.....

COUNT 10 WASHINGTON UNFAIR BUSINESS PRACTICES ACT – CONSUMER PROTECTION ACT (RCW 19.86.020).....

COUNT 11 WASHINGTON UNFAIR BUSINESS PRACTICES – CONSUMER PROTECTION ACT (RCW 19.86.030)/WASHINGTON STATE CONSTITUTION .....

COUNT 12 PUBLIC NUISANCE .....

VI. JURY DEMAND.....

VII. PRAYER FOR RELIEF.....

SECOND AMENDED COMPLAINT
(JURY DEMAND)

Plaintiff Association of Washington Public Hospital Districts (the "AWPHD") is a Washington unincorporated association whose members include the Plaintiff Public Hospital Districts. Plaintiff Public Hospital Districts (collectively, the "Public Hospital Districts") are municipal corporations organized under Chapter 70.44 of the Revised Code of Washington to own and operate hospitals and other health care facilities and to provide hospital services and other health care services for district residents and other persons. The AWPHD and the Public Hospital Districts, by and through their counsel of record, Foster, Pepper & Shefelman PLLC, for their complaint against Defendants in this action – the major tobacco companies in the United States (collectively, the "Tobacco Companies") and their trade associations, research agents and public relations firm – allege as follows:

I. NATURE OF THIS ACTION

A. Summary of Plaintiffs' Claims

1. Plaintiff Public Hospital Districts are political subdivisions of the State of Washington, created for the special purpose of preserving the promoting the health of its citizens. Each Public Hospital District is required by law to provide unreimbursed health care services – including "charity care" to the poor – to patients who have suffered and continue to suffer from tobacco-related disease. The costs incurred by the Public Hospital Districts in providing unreimbursed health care services for the treatment of tobacco-related disease are estimated at millions of dollars per year. These costs are the direct

and proximate cause of the Tobacco Companies' and other Defendants' ongoing conspiracy and deceptive, illegal and tortious acts described here. This injury does not take the form of personal injuries suffered by smokers, and it is not a derivative injury of the harm caused to smokers. It is a separate and direct economic injury to the business and property of the Public Hospital Districts, which injury was intended by Defendants and is wholly distinct from the harms suffered by individuals. This action seeks to hold the Tobacco Companies and other Defendants accountable for their conduct and the resulting injury to the Public Hospital Districts.

2. Smoking-related illnesses account for one out of every five deaths each year in the United States, cigarette smoking is thus the leading cause of premature death in this country, killing more than 400,000 Americans annually. The ruinous health impact caused by the Tobacco Companies' products is unprecedented. For example, (a) cigarette smoking causes as much as 85% of all lung cancer; (b) smoking causes more than 80% of deaths from pulmonary diseases, such as emphysema and bronchitis; and (c) smoking causes thousands of deaths from cardiovascular diseases, such as stroke, heart attack, peripheral vascular disease and aortic aneurysm. All told, annual smoking-related deaths exceed the combined deaths caused by automobile accidents, AIDS, alcohol use, illegal drug use, homicide, suicide and fires.

3. In addition, many patients served by the Public Hospital Districts have been victims of illnesses attributable to passive or second-hand smoke by virtue of their exposure to smoke from Defendants' tobacco and other nicotine products. Such exposure has also resulted in increased health care costs borne by the Public Hospital Districts.

4. In 1953, the Tobacco Companies and their allies entered into a conspiracy that continues to this day – a conspiracy that was intended, with great success, to perpetuate smoking and nicotine addiction among residents of the United States. From the outset, the Tobacco Companies and the other Defendants knowingly and intentionally embarked on a scheme to addict millions of people, including residents of communities served by the Public Hospital Districts, to cigarettes and other tobacco products – all with the intent of increasing the Tobacco Companies' annual profits. As a result, millions of Americans have become sick or died and millions more will become sick or die. As part of their continuing conspiracy, the Tobacco Companies and their allies also intended to force and, again with great success, have forced Public Hospital Districts and others to bear the cost of the diseases and deaths caused by the conspiracy.

5. The Tobacco Companies have known for decades, as a result of their internal scientific studies, that (a) they are primarily in the business of selling the drug nicotine; (b) nicotine is addictive; (c) cigarettes serve primarily as devices to deliver nicotine into the human bloodstream; (d) smoking and chewing tobacco cause or substantially contribute to myriad delibilitating illnesses, including lung, throat and other cancers, emphysema, heart failure and stroke; and (e) millions of people become sick or die as a result of using tobacco products. They have also known for decades that full public awareness of the truth about their products would have had a devastating impact on their financial performance. Defendants intended to, did, and continue to impose on the Public Hospital Districts the enormous cost of treatment of tobacco-related illnesses and addiction. Through their conspiracy of lies, deceit and other unlawful con-

duct, the Tobacco Companies have avoided paying such health care costs and, as a result, have unlawfully shifted a large amount of such costs to the Public Hospital Districts.

6. Commencing in 1953, the Tobacco Companies conspired to and did embark upon a massive and prolonged program of purposeful deception and misrepresentation and unreasonable restraint of trade that continues to this day. Repeatedly, they have made and continue to make knowingly false public pronouncements – and have given knowingly false sworn testimony – to the effect that they neither possessed nor knew of any evidence that nicotine is addictive or that the use of their tobacco products caused any illnesses or diseases. This was exactly the nature of the blatantly false testimony provided by chief executives of a number of the Tobacco Companies in 1994 before a committee of the U.S. House of Representatives. Even today, as the Tobacco Companies attempt to use their political muscle to enact legislation immunizing their legal liabilities, the Tobacco Companies continue to mislead Congress about their knowledge of the deadly and addictive nature of smoking and chewing tobacco. This campaign continues to the present day through, among other things, the use of scare tactics and misleading statements published in nationally circulated newspapers and magazines. Such statements were published as recently as April 1998. Through this public campaign of deception and lying to Congress and other public health authorities, the Tobacco Companies and other Defendants intended that, among others, the Public Hospital Districts would rely to their detriment on such statements and that as a result the Public Hospital Districts would be required to bear a large share of the cost of the national health calamity knowingly and intentionally caused by the Tobacco Companies.

7. Defendants rationalize that smoking is a matter of individual choice. In fact, the American public, including the residents of communities served by the Public Hospital Districts, has never been given an opportunity to make a well-informed choice about smoking because Defendants' own deception has prevented the public from fully understanding the depth and severity of the addictive nature of cigarettes and other tobacco products. For example, in an internal 1978 memorandum, Defendant Brown & Williamson Tobacco Corporation acknowledged that "very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison."

8. The Tobacco Companies' and the other Defendants' conspiracy went further and relied on a subtler campaign of subterfuge. While falsely claiming that their products were becoming healthier, they spent millions of dollars on research to ensure that their products continued to contain addictive amounts of nicotine. While falsely claiming to assume a public duty with regard to the relationship between smoking and health, they actually concentrated their efforts on marketing methods that were meant to increase nicotine consumption and addiction. Targeting children, the poor, and minorities has been and continues to lie at the foundation of the Tobacco Companies' plot to increase tobacco and nicotine consumption and to ensure that they capture an addicted customer base for the future. The Tobacco Companies have known for years that as a result of their ongoing illegal conduct and conspiracy, millions of addicted smokers would be unable to quit smoking and would be customers until smoking killed them.

9. As the Tobacco Companies developed the techniques to increase the effective level of nicotine in

cigarettes through various manufacturing techniques, they also touted in internal documents their ability to set nicotine at greatly reduced levels. However, they recognized the clear danger this ability presented to the profitability of an industry built upon the nicotine addiction, and decided to "take a stand" against lowering nicotine levels to a point at which cigarettes would no longer be addictive, lest smokers be "weaned" from their expensive and dangerous habit. Thus, the Tobacco Companies have had the ability to sell cigarettes that are not addictive – that consumers would truly choose to smoke rather than consume to satisfy an addiction – but have chosen to withhold these products from the market despite the tremendous costs addictive cigarettes impose on the Public Hospital Districts and the public health system generally as the toll on lives and the nation's health continues.

10. The Tobacco Companies have also violated the antitrust laws of the United States and of Washington State, laws that protect competition as to quality and innovation just as vigorously as they protect competition as to price. Defendants have broken these laws by entering into, in 1953, and continuing to this day to abide by the terms of, a combination and conspiracy in unreasonable restraint of trade:

- to suppress innovation and competition in product quality – by agreeing not to engage in research, development, manufacturing and marketing of less harmful cigarettes and other tobacco products;
- to suppress output in a market, and to engage in a concerted refusal to deal – by agreeing to zero output of less harmful cigarettes and other tobacco products; and

- to suppress competition in marketing – by agreeing not to take business from one another by making claims about the relative safety of particular brands, whether or not such claims would have been truthful.

This willful violation of the antitrust laws resulted in clearly foreseeable injury to the Public Hospital Districts. It was foreseeable that their antitrust violations would cause the precise type of injury that the Public Hospital Districts have suffered in their business or property – increased costs for health care and related services needed by smokers – injury that is inextricably intertwined with that suffered by the smokers themselves. Moreover, but for the unlawful agreement, the Public Hospital Districts would have had the opportunity to be customers for less harmful cigarettes, or other nicotine products, as part of their efforts to wean their nicotine-addicted patients from addiction to cigarettes and the use of other tobacco products or to ameliorate the consequences of that addiction.

11. In this action, the Public Hospital Districts and the AWPHD intend to bring the Tobacco Companies to account for the business and financial injuries that the Public Hospital Districts have suffered as a direct and proximate result of Defendants' decades-long conspiracy of deceit, manipulation and death.

B. Nature of Plaintiffs' Business

12. The Public Hospital Districts are municipal corporations created as political subdivisions of the State of Washington to provide hospital and other health care services to the residents of this State and the general public. Each Public Hospital District is governed by a commission composed of members elected from the district.

The Public Hospital Districts have been granted broad authority by the State of Washington to pursue their statutory mandate of providing for the health care of the citizens of this State.

13. Each of the Public Hospital Districts owns and operates one or more of the following kinds of health care facilities: hospitals, nursing homes, skilled nursing facilities, outpatient and rehabilitative facilities, and hospices. In operating these facilities, the Public Hospital Districts are direct purchasers of drugs and other health care products, including nicotine delivery products for the treatment of nicotine addiction.

14. The Public Hospital Districts operate as non-profit organizations that obtain revenue from the services they provide to the public. These revenues cover in part the costs of providing health care services. Revenues are not generally sufficient to cover costs. Therefore, the activities of the Public Hospital Districts are subsidized by taxes levied on the citizens of the individual districts.

15. Federal and Washington State law require the Public Hospital Districts to provide certain health care services for free or for fees that do nto fully compensate the Districts. For example, under federal law, 42 U.S.C. §1395dd, the Public Hospital Districts are required to treat any person who comes to the Emergency Care facilities of their respective hospitals and requests treatment, without regard to ability to pay.

16. Under Washington State law, RCW 70.170, the Public Hospital Districts are required to provide charity care for the full amount of hospital charges to patients without private or public health coverage, whose income is below the federal poverty standard, and a sliding scale of charges for certain patients at higher levels of income.

As a result of these laws, the Public Hospital Districts are required to provide this and other care for which they do not receive full compensation (as used in this complaint, "unreimbursed health care service").

17. A significant portion of the unreimbursed care the Public Hospital Districts are required to provide is for the treatment of tobacco-related disease that is the direct result of the Tobacco Defendants' wrongful conduct. The Public Hospital Districts do not have contractual rights to pursue through subrogation the recovery from Defendants of unreiumbursed tobacco-related health care services. To provide funding for tobacco-related unreimbursed care, the Public Hospital Districts have been required, and will be required until such time as the Tobacco Defendants' wrongful conduct ceases, to divert resources from the provision of other health care services and/or to obtain a subsidy from taxpayers in their respective districts.

18. In addition, many Public Hospital Districts have expended and will continue to expend substantial sums of money to research, fund and promote wellness and health lifestyle programs in order to reduce health care costs. A portion of these increased expenditures have also been caused by the unlawful actions of the Tobacco Companies and other Defendants.

19. The Association of Washington Public Hospital Districts is a trade association with standing to assert claims for injunctive and declaratory relief against the Tobacco Companies and other Defendants.

II. JURISDICTION AND VENUE

20. Jurisdiction of this Court is predicated upon federal question jurisdiction, 28 U.S.C. §1331; divers-

ity jurisdition, 28 U.S.C. §1332; and the original jurisdiction granted under 28 U.S.C. §1337(a). Federal question jurisdiction is based on 15 U.S.C. §§15 and 26 (the Clayton Act) and 18 U.S.C. §§1962 and 1964 (Federal Raceteer Influenced and Corrupt Organization Act ("RICO")). For purposes of diversity jurisdiction, the amount in controversy exceeds $75,000 for each Defendant, exclusive of costs and interest.

21. The Court has pendent jurisdiction under 28 U.S.C. §1367(a) over the Public Hospital Districts' state law claims because they are so related to the federal question claims that they form part of the same case or controversy and stem from the same nucleus of facts on which the federal antitrust and RICO claims are based.

22. At all times material hereto, Defendants resided and did business in the Western District of Washington. Venue is thus proper in this District under 28 U.S.C. §1391(b). Moreover, at all times material hereto, Defendants were found or transacted business in this District; accordingly, venue is proper in this District under 15 U.S.C. §22 and 18 U.S.C. §1965.

III. THE PARTIES

A. Plaintiffs

23. The Association of Washington Public Hospital Districts, a Washington unincorporated trade association representing the collective needs and interests of public hospital districts in the State of Washington.

24. Adams County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Ritzville, Washington.

25. Adams County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Othello, Washington.

26. Affiliated Health Services, a general partnership of Skagit County Public Hospital District No. 1 and Skagit and Whatcom Counties Public Hospital District No. 304, has its principal place of business, and owns and operates hospital facilities located on two campuses, in Mount Vernon and Sedro-Woolley, Washington.

27. Chelan County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Chelan, Washington.

28. Clallam County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Forks, Washington.

29. Clallam County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Port Angeles, Washington.

30. Douglas, Grant, Lincoln, Okanogan Counties Public Hospital District No. 6 has its principal place of business, and owns and operates a hospital and provides other health care services, in Grand Coulee, Washington.

31. Ferry County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Republic, Washington.

32. Garfield County Public Hospital District has its principal place of business, and owns and operates a

hospital and provides other health care services, in Pomeroy, Washington.

33. Grant County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Moses Lake, Washington.

34. Grant County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Quincy, Washington.

35. Grant County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Ephrata, Washington.

36. Grays Harbor County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in McCleary, Washington.

37. Jefferson County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Port Townsend, Washington.

38. Kennewick Public Hospital District has its principal place of business, and owns and operates a hospital and provides other health care services, in Kennewick, Washington.

39. King County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Renton, Washington.

40. King County Public Hospital District No. 2 has its principal place of business, and owns and operates

a hospital and provides other health care services, in Kirkland, Washington.

41. Kittitas County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Ellensburg, Washington.

42. Lewis County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Morton, Washington.

43. Mason County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Shelton, Washington.

44. Okanogan County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Omak, Washington.

45. Okanogan County Public Hospital District No. 4 has its principal place of business, and owns and operates a hospital and provides other health care services, in Tonasket, Washington.

46. Okanogan and Douglas Counties Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Brewster, Washington.

47. Pacific County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in South Bend, Washington.

48. Pacific County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Ilwaco, Washington.

49. Pend Oreille County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Newport, Washington.

50. Prosser Public Hospital District has its principal place of business, and owns and operates a hospital and provides other health care services, in Prosser, Washington.

51. Skagit County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Mount Vernon, Washington.

52. Skagit County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Anacortes, Washington.

53. Skagit and Whatcom Counties Public Hospital District No. 304 has its principal place of business, and owns and operates a hospital and provides other health care services, in Sedro-Woolley, Washington.

54. Snohomish County Public Hospital District No. 1 has its principal place of business, and owns and operates a hospital and provides other health care services, in Monroe, Washington.

55. Snohomish County Public Hospital District No. 2 has its principal place of business, and owns and operates a hospital and provides other health care services, in Edmonds, Washington.

56. Snohomish County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Arlington, Washington.

57. Whitman County Public Hospital District No. 1-A has its principal place of business, and owns and operates a hospital and provides other health care services, in Pullman, Washington.

58. Whitman County Public Hospital District No. 3 has its principal place of business, and owns and operates a hospital and provides other health care services, in Colfax, Washington.

B. Defendants

59. Defendant Philip Morris Incorporated ("Philip Morris"), is a Virginia corporation whose principal place of business is 120 Park Avenue, New York, New York. Philip Morris manufacturers, advertises and sells cigarettes and other nicotine tobacco products throughout the United States.

60. Defendant R.J. Reynolds Tobacco Company ("RJR") is a New Jersey corporation whose principal place of business is Fourth & Main Streets, Winston-Salem, North Carolina. RJR manufactures, advertises and sells cigarettes and other nicotine tobacco products throughout the United States.

61. Defendant Brown & Williamson Tobacco Corporation ("Brown & Williamson") is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky. Brown & Williamson manufactures, advertises and sells cigarettes and other nicotine tobacco products throughout the United States. Brown & Williamson has also been named a defendant as successor in interest to The American Tobacco Company ("American Tobacco"), which merged with Brown & Williamson in 1994. As such, Brown & Williamson is legally liable for the conduct of American Tobacco.

62. Defendant British American Tobacco p.l.c., and B.A.T. Industries p.l.c. (collectively "B.A.T.") are British corporations whose principal place of business is Windsor House, 50 Victoria Street, London SW1H ONL. British American Tobacco p.l.c. is the sole shareholder of B.A.T Industries p.l.c. and its tobacco subsidiaries, including Brown & Williamson. Through a succession of intermediary corporations and holding companies, B.A.T. is the sole shareholder of Brown & Williamson. Through Brown & Williamson, B.A.T. has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States. B.A.T. has also conducted, or through its agents, subsidiaries, affiliated companies or co-conspirators conducted, significant research for Brown & Williamson on the topics of smoking, disease and addiction. Brown & Williamson and B.A.T. conspired to remove from the United States and to send to B.A.T. in England quantities of research conducted in the United States on the topics of smoking, disease and addiction in order to remove sensitive and inculpatory documents from U.S. jurisdiction. B.A.T. is a participant in the conspiracy described herein and has caused harm and affected commerce in the United States.

63. Defendant British American Tobacco (Investments) Limited (formerly known as British-American Tobacco Company Limited) ("BATCO"), is a British corporation whose registered office is at Milbank, Knowles, Green, Staines, Middlesex, England TW18 1DY. Defendant BATCO is or was a related corporation of defendant Brown & Williamson. Both are owned by B.A.T. BATCO advertises, promotes and sells its own nicotine tobacco products throughout the United States. At all times pertinent to this complaint, defendant BATCO, individually or through its affiliate, agent and

alter ego, subsidiary and/or division defendant Brown and Williamson, designed, tested, manufactured, marketed and sold cigarettes for use in the United States. BATCO has itself or has through its affiliated companies, agents, or subsidiaries also conducted significant research for Brown & Williamson on the topics of smoking, disease and addiction. On information and belief, Brown & Williamson also sent to England research conducted in the United States on the topics of smoking, disease and addiction in order to remove the sensitive and inculpatory documents from U.S. jurisdiction. BATCO is a participant in the conspiracy described herein and has caused harm and affected commerce in the United States.

64. Defendant Lorillard Tobacco Company ("Lorillard") is a Delaware corporation whose principal place of business is 1 Park Avenue, New York, New York. Lorillard manufactures, advertises and sells cigarettes and other nicotine tobacco products throughout the United States.

65. Defendant Liggett Group, Inc. ("LGI"), is a Delaware corporation whose principal place of business is 700 West Main Street, Durham, North Carolina. LGI manufactures, advertises and sells cigarettes and other nicotine tobacco products throughout the United States.

66. Defendant Liggett & Myers, Inc. ("Liggett"), is a Delaware corporation whose principal place of business is Main and Fuller, 710 Main Street, Durham, North Carolina. Liggett manufactures, advertises and sells cigarettes and other nicotine tobacco products throughout the United States

67. Defendant United States Tobacco Company ("U.S. Tobacco") is a Delaware corporation whose principal place of business is 100 West Putnam Avenue,

Greenwich, Connecticut. U.S. Tobacco manufactures, advertiese and sells cigarettes. U.S. Tobacco also manufactures, advertises and sells approximately 88% of the smokeless tobacco (snuff and chewing tobacco) sold in the United States under various brand names.

68. Defendant The Tobacco Institute, Inc. ("Tobacco Institute"), is a New York nonprofit corporation whose principal place of business is 1875 "I" Street, N.W., Suite 800, Washington D.C. At all relevant times, the Tobacco Institute operated as a propaganda and lobbying arm of the Tobacco Companies and was an agent of the Tobacco Companies. The Tobacco Institute has been involved in the conspiracy described in this complaint, and the actions of the Tobacco Institute have affected commerce and caused harm throughout the United States. On information and belief, the Tobacco Institute was dissolved pursuant to Court Order in January 1999 and a receiver was appointed.

69. Defendant The Council for Tobacco Research - U.S.A., Inc. ("CTR"), is a New York nonprofit corporation whose principal place of business is 900 Third Avenue, New York, New York. CTR is successor in interest to the Tobacco Institute Research Committee ("TIRC"). At all relevant times, both CTR and TIRC operated as propaganda and lobbying arms of the Tobacco Companies and as agents and employees of the Tobacco Companies. CTR and TIRC have been involved continuously in the conspiracy described herein, and their actions have affected commerce and caused harm throughout the United States. On information and belief, CTR was dissolved pursuant to Court Order in November 1998 and a receiver was appointed.

70. Defendant Smokeless Tobacco Council, Inc. ("STC"), is a New York nonprofit corporation whose

principal place of business is 1627 "K" Street N.W., Washington D.C. Founded in 1969, STC for most of its history was dominated by U.S. Tobacco, the largest manufacturer of smokeless tobacco products in the United States. In September 1996, U.S. Tobacco resigned from STC, leaving as its members Brown & Williamson and several small producers of smokeless tobacco, including The Pinkerton Company, National Tobacco Company, Swisher International and Conwood Company LP. At all relevant times, STC operated as a propaganda and lobbying arm of the Tobacco Companies and as an agent and employee of the Tobacco Companies. STC has been financially supported by several of the largest tobacco companies, including at least Brown & Williamson, Lorillard and RJR, and has been involved continuously in the conspiracy described herein. By its conduct STC has affected commerce and caused harm throughout the United States.

71. Defendant Hill and Knowlton, Inc. ("Hill and Knowlton"), is an international public relations firm whose principal place of business is 420 Lexington Avenue, New York, New York. Hill and Knowlton was centrally involved in the wrongful conduct and conspiracy since its creation, and Hill and Knowlton's actions have affected commerce and caused harm throughout the United States.

72. Various other persons, firms, and corporations who have been named as Unknown Corporations A-Z are parent corporations, alter egos, holding corporations, aliases, subsidiaries, affiliates or otherwise related to the named Defendants and participated in the wrongful acts alleged in this complaint.

IV. THE DEFENDANTS' CONSPIRACY

A. The Health Consequences of Tobacco

73. The human tragedy of smoking-related disease is enormous. Cigarette smoking is the leading cause of premature death in the United States. According to the Federal Centers for Disease Control and Prevention, each year smoking-related illnesses kill more than 400,000 Americans, exceeding the combined deaths caused by automobile accidents, AIDS, alcohol use, illegal drug use, homicide, suicide and fires. Smoking-related illnesses account for one of every five deaths each year in the United States.

74. At least 43 chemicals in the smoke inhaled by persons using the Tobacco Companies' products have been determined to be carcinogenic. Cigarette smoking causes as much as 85% of all lung cancer. Tobacco products are also linked to cancers of the mouth, larynx, esophagus, stomach, pancreas, uterus, cervix, kidney and colon, among others. All told, tobacco use is responsible for at least 30% of all deaths from cancer. Smoking is the cause of more than 80% of deaths from pulmonary diseases such as emphysema and bronchitis. Smoking is also responsible for thousands of deaths from cardiovascular diseases, including stroke, heart attack, peripheral vascular disease and aortic aneurysm. Tobacco use is also linked to a large number of other serious illnesses.

75. The health consequences of smoking among women are of special concern because of the deleterious effect on reproduction. Smoking reduces fertility, increases the rate of miscarriages and stillbirths, retards uterine fetal growth and results in lower birth weight in infants.

76. As a direct result of the unrestrained and unlawful conduct of the Tobacco Companies and other Defendants, tobacco use has become the most pervasive public health issue of our time and the single most preventable cause of death in our society.

77. Independent medical research has now established that smoking cigarettes also creates a behavioral addiction and habit because it contains nicotine. But the addiction created by nicotine is not merely behavioral or psychological, it is also physiological and involves physical alteration to a smoker's brain structure and functioning. In the absence of nicotine, the addicted smoker suffers symptoms of physical withdrawal, including headaches, constipation, insomnia, depression, inability to concentrate and anxiety. Defendants have known this for decades but have lied about and suppressed these facts, as documents they unsuccessfully conspired to conceal have recently revealed.

78. Once a person starts smoking, it is extremely difficult to stop, and most who try do not succeed. Many smokers are unable to quit until they have heart or lung surgery. Even after a heart attack or lung cancer surgery, approximately one-half of all survivors return to smoking. The changes to the central nervous system involved in nicotine addiction are similar to those involved in cocaine addiction. According to the Surgeon General of the United States:

> The pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

79. In 1996, the Food and Drug Administration ("FDA") promulgated regulations establishing its assertion of jurisdiction over tobacco products as medical

drugs and devices under the Federal Food, Drug and Cosmetic Act. In August 1997, after the Tobacco Companies had unsuccessfully challenged the FDA's jurisdictional authority in federal court, these regulations became effective. The FDA concluded that cigarettes and smokeless tobacco are combination products consiting of nicotine – a drug that causes addiction and other significant pharmacological effects on the human body – and medical device components that deliver nicotine to the body.

80. Smokeless tobacco, which contains nicotine, can also cause cancer. The risk of oral cancer in particular increases with increased exposure to smokeless tobacco products, especially in those areas of the mouth where smokeless tobacco products are used. The risk of cheek and gum cancers is nearly 50 times greater in long-term snuff users than in nonusers. Snuff and chewing tobacco contain potent carcinogens, including nitrosamines, polynuclear aromatic hydrocarbons and radioactive polonium.

81. Smokeless tobacco use can cause oral leukoplakia, a precancerous lesion of the soft tissue around the mouth that consists of a white patch or plaque that cannot be scraped off. One study of 117 high school students who were smokeless tobacco users revealed that nearly 50% of those students had oral tissue alterations. There is a 5% chance that oral leukoplakias will transform into malignancies within five years.

82. Smokeless tobacco can cause oral cancer and oral leukoplakia and may be associated with an increased risk of cancer of the esophagus. Smokeless tobacco use has been implicated in cancers of the gum, mouth, pharynx and larynx. Snuff use also causes gum recession and is associated with discoloration of teeth and fillings, dental cavities, and tooth abrasion.

B. Industry Concentration

83. Throughout this century, cigarette manufacturing has been one of the most concentrated industries in the United States. Unril 1994, Philip Morris, RJR, Brown & Williamson, American Tobacco, Lorillard and Liggett together constituted the Bix Six cigarette manufacturers, which controlled virtually 100% of the U.S. market. In 1994, American Tobacco was acquired by B.A.T. and merged with Brown & Williamson. Philip Morris and RJR are the industry leaders, with national market shares of approximately 48% and 25%, respectively, as of March 31, 1998. The approximate market shares of the other cigarette manufacturers are Brown & Williamson, 17%; Lorillard, 8%; and Liggett, 2%. U.S. Tobacco manufactures 88% of the smokeless tobacco products sold in the United States.

84. The Tobacco Industry is a tight-knit oligopoly, with a history of collusion. There are substantial barriers to entry into the tobacco market. These barriers include substantial capital costs for entry, patents, reputational barriers, firmly entrenched encumbent firms with stable market shares, substantial economies of scale and production, and regulatory barriers. These barriers to entry are evidenced both by the absence of entry into the tobacco market and by a history of high profit margins among industry participants.

85. In part because of its concentration and in part because its customers are physically addicted to the product, making demand relatively inelastic, the Tobacco Industry is enormously profitable, with profit margins by each of the Tobacco Companies estimated at over 30%. The Tobacco Companies earn billions of dollars in profits each year. For example, in 1996, Philip Morris' parent corporation reported record earnings of $4.2

billion (on worldwide sales of $36.5 billion). Philip Morris' record eanings in 1996 were driven, in part, by increased sales of nicotine products in the United States, with shipments of 230.8 billion cigarettes.

86. In addition, industry concentration and high barriers to entry have allowed the Tobacco Companies and their trade associations to engage in a decades-long conspiracy not to compete in the research, development, production and marketing of less harmful cigarettes.

C. Overview of Defendants' Wrongful Conduct and Conspiracy

87. For nearly a half-century, the Tobacco Companies and the other Defendants have pursued an unlawful course of conduct and conspiracy of deceit and misrepresentation against the public, the health care industry and health care providers in order to promote and maintain sales of tobacco products and the profits derived therefrom, to shield themselves from having to pay the health care and other costs attributable to tobacco-related diseases, and to shift those costs to others, including the Public Hospital Districts. The conspiracy and other wrongful conduct continues to this day. The Tobacco Companies continue to misrepresent and conceal facts and information from the Public Hospital Districts and the public at large.

88. Defendants' conspiracy consists fundamentally of four strategies: *first*, they agreed to represent falsely to the public that they were creating a new, unbiased and therefore trustworthy source to address issues concerning smoking and health; *second*, they counted on the public's acceptance of their representations of trustworthiness to allow them to pursue a massive and sophisticated effort to misrepresent, suppress, distort and confuse the facts

about the health dangers of tobacco products, including nicotine addiction, while at the same time manipulating the levels of nicotine in their products to foster continued addiction; *third,* they agreed among themselves to refrain from competing with each other to produce and market less harmful cigarettes and other nicotine tobacco products; and *fourth,* they agreed not to compete among themselves with respect to any claims relating to the relative health superiority of specific tobacco products.

89. The Tobacco Companies set their plan in motion by creating a joint industry research organization in 1954, originally called the Tobacco Industry Research Committee and later named the Council for Tobacco Research. Since that time, the Tobacco Companies have used the credibility derived from these and other ostensibly disinterested industry-funded research organizations to suppress or misrepresent to the public material facts about the effects of tobacco use. Although they knew of the serious health dangers inherent in the use of their products, including the addictiveness of nicotine, Defendants have complemented the above scheme by constructing and disseminating the fallacious argument that (a) "objective" research to determine whether the use of tobacco products causes disease and death is insufficient and (b) tobacco products are not addictive.

90. Defendants' interconnected and conspiratorial strategies – suppressing material information; misrepresenting the facts about the harmful effects of smoking; using the credibility gained by such misrepresentations to deceive Congress, regulators, the public, the health care industry, and health care providers, including the Public Hospital Districts, about smoking and health; and restraining trade and competition by agree-

ing not to compete in the research, development and marketing of a less harmful cigarette – have been repeated continuously for more than four decades. Defendants have been and are engaged in a continuous conspiracy to deceive Congress, regulators, the public, the health care industry, and health care providers, including the Public Hospital Districts, regarding facts material to reaching an informed understanding of the health consequences of smoking and to deciding whether to purchase and use tobacco products.

91. Moreover, as confidential industry research confirmed the dangers of using tobacco products, including the addictiveness of nicotine, Defendants' deception rose to a new level. Although promising the public that they would make full disclosure of the results of their research, Defendants concealed their own negative health and addiction research results from Congress, regulators, the public, public health officials, the health care industry, and health care providers, including the Public Hospital Districts. These research results have not been voluntarily released to this day. Defendants have also not disclosed, and in fact have denied, that the Tobacco Companies manipulate and control the content and delivery of nicotine in their products to create and sustain consumers' addiction to tobacco products. Defendants have further conspired to suppress the development, testing and marketing of less harmful cigarettes, while fraudulently maintaining that their products are safe or that there are no less harmful alternatives to their products. Defendants have also conspired to discredit or cast doubt upon the results of legitimate and accurate scientific research and findings confirming the negative health effects of nicotine and tobacco use.

92. The success of the Tobacco Companies' campaign of deceit, concealment and misinformation has depended, in large part, on Defendants' acting in concert. Without the agreement of each of the Tobacco Companies to suppress the truth about the health consequences and addictive nature of using tobacco products, the deception that the joint industry research efforts were objective would have been revealed and the claim that "not enough facts are known" to indict the use of the products would have been roundly rejected. Defendants agreed to come and stay together in order to accomplish what would not otherwise have occurred – the unified and consistent dissemination of false information and the distortion of public information about the use of tobacco products and their impact on health and addiction. Similarly, the strategy of restraining competition by refraining from producing and marketing less harmful products arose from Defendants' conspiratorial and concerted action.

93. Defendants were aware that unless they took the actions they agreed to take and subsequently took, the volume of tobacco product sales would have substantially decreased and the size of their profits would have substantially diminished. Defendants were also aware that if they were required to pay the health care costs caused by, and resulting from, the use of their products, including costs incurred directly by the Public Hospital Districts, the Tobacco Companies' profits would have substantially decreased.

94. The Public Hospital Districts were directly and indirectly injured by Defendants' wrongful and unlawful conduct in several significant ways. The Tobacco Companies have known since at least the 1950s that their products are inextricably linked to the health care

market. Indeed, a 1968 internal draft Philip Morris memorandum stated: "Most Philip Morris products, both tobacco and non-tobacco, are directly related to the health field." Defendants have known that health care providers, including the Public Hospital Districts, provide unreimbursed health care services and would be directly affected in their business and property by the Tobacco Companies' actions. Defendants have known that such health care providers, including the Public Hospital Districts, would and did rely to their detriment on Defendants' false and misleading statements.

95. But for the Tobacco Companies' and the other Defendants' campaign of misinformation regarding the dangerous and deadly effects of nicotine and tobacco consumption, health care providers, including the Public Hospital Districts, would have had the opportunity to provide counseling services with respect to smoking and health, had earlier access to nicotine delivery systems for the treatment of nicotine addiction for smoking, or taken other steps in an attempt to reduce the costs imposed by the Tobacco Companies' wrongful conduct. By preventing or causing the delay of such counseling efforts and programs, the Tobacco Companies and other Defendants have substantially increased the number of the Public Hospital Districts' patients requiring medical treatment for tobacco-related diseases and addiction. Through their illegal course of conduct, the Tobacco Companies have substantially increased the costs of unreimbursed health care services incurred by the Public Hospital Districts.

96. In addition, had the Tobacco Companies and other Defendants disclosed their confidential research demonstrating the deadly and dangerous effects of smoking and chewing tobacco and otherwise refrained from their con-

spiracy of deceit, the Public Hospital Districts and other governmental entities that bear responsibility for the public's health would have initiated or sooner initiated programs that would have reduced the incidence of smoking and chewing tobacco among the general population and among the Public Hospital Districts' patients. By staving off government regulation, Defendants caused the perpetuation of cigarette smoking, thereby increasing the incidence of smoking-related diseases among both the Public Hospital Districts' patients and the public at large. Defendants' unlawful conduct directly injured the Public Hospital Districts by increasing the number of patients requiring medical treatment for tobacco and nicotine-related illnesses and addiction, and preventing or delaying the availability of products to treat such illness or addiction.

D. The Tobacco Companies' Ongoing Public Deception About Smoking and Health

97. Inhalable tobacco became widely popular in the 19th century when W. Duke and Sons ("Duke") introduced a mechanized cigarette-rolling machine. Through this device, cigarettes were mass produced, distributed and sold nationwide.

98. In 1881, Duke's factory produced 9.8 million cigarettes, 1.5% of the total market share. Only five years later, Duke manufactured 744 million cigarettes, more than the national total in 1883. By 1890, Duke's competitors, who by that time had become mechanized, joined forces with Duke to establish The American Tobacco Company. By the turn of the century, Duke manufactured or sold 9 of every 10 cigarettes.

99. Shortly after the formation of The American Tobacco Company, the State of North Carolina initiated an

antitrust suit against the company. In May 1911, the Supreme Court dissolved The American Tobacco Company, which was succeeded by four large firms: Liggett, RJR, Lorillard and American Tobacco, plus many smaller firms.

100. Cigarette smoking increased dramatically in the first half of the 20th century, followed by an increase in incidences of lung and other cancers and diseases. As a result, issues began to arise concerning the health effects associated with smoking cigarettes. In a 1946 letter to Lorillard's manufacturing committee, a Lorillard chemist reported: "Certain scientists and medical authorities have claimed for many years that the use of tobacco contributes to cancer development in susceptible people. Just enough evidence has been presented to justify the possibility of such a presumption." Similarly, in 1945, Dr. Alton Ochsner, a New Orleans surgeon and regional medical director of the American Cancer Society, told an audience at Duke University that "there is a distinct parallelism between the incidence of cancer of the lung and the sale of cigarettes . . . [that] the increase is due to the increased incidence of smoking and that smoking is a factor because of the chronic irritation it produces."

101. In response to such medical concerns about smoking, the Tobacco Companies through industry spokesmen dismissed such reports as "the health scare." The Tobacco Companies also engaged in adversiting campaigns to induce the public to believe that cigarette smoking was actually beneficial to one's health. The Tobacco Companies made express claims and warranties about the healthfulness of their products – with reckless disregard for the falsity of their claims and the consequential adverse impact on consumers. Examples of their health warranties include the following: Old Gold, "Not a cough

in a carload"; Camel, "Not one single case of throat irritation due to smoking Camel"; Philip Morris, "The Throat-tested cigarette." Brown & Williamson also claimed that Kool cigarettes would keep the head clear and provide protection against colds.

102. These health-claim advertising campaigns were disseminated nationally in popular magazines, as well as on radio and television, and were calculated to persuade nonsmokers to begin smoking and to persuade smokers to continue their use of products already causing them harm and injury. These campaigns were materially false and misleading.

103. There are numerous other examples of the Tobacco Companies' materially deceptive campaigns. In 1952, Liggett conducted a test for advertising purposes to demonstrate that smoking Chesterfield cigarettes would produce no harmful effects on the nose, throat and affected organs. The test was designed to have no real scientific value. Nonetheless, the test's rigged conclusion that smoking Chesterfield cigarettes had no harmful effect on the stated organs was widely publicized, and Liggett used the purported results to assure the general public that smoking Chesterfield cigarettes was harmless.

104. During the 1950s, Liggett sponsored the nationally popular Arthur Godfrey radio and television show wherein health claims were made based on alleged scientific studies assuring that "smoking Chesterfields would have no adverse effects on the throat, sinuses or affected organs."

105. Earlier consumer-oriented ads from the 1930s and 1940s often spouted wide-ranging medical claims that depicted physicians holding cigarettes in the company of endorsers including Santa Claus ("Luckies are

easy on my throat"), movie stars, sports heroes and circus stars. Similar ads even appeared in medical journals, targeted directly to physicians. One, for example, touted the Camel cigarette booth at the American Medical Association's 1942 Annual Meeting.

106. Chesterfield cigarette ads begun running in the *New York State Journal of Medicine* as early as 1933. The ads carried claims such as "Just as pure as the water you drink . . . and practically untouched by human hands."

107. The Tobacco Companies sponsored cigarette ads in the *New England Journal of Medicine*, the *Journal of the American Medical Association ("JAMA")* and *The Lancet* from the 1930s through the 1950s.

108. For years, Philip Morris made various claims that its cigarettes were less irritating than other brands. An advertisement in a 1943 issue of the *National Medical Journal* urged: "Don't smoke is hard advice for patients to swallow. May we suggest instead 'Smoke Philip Morris'? Tests showed three out of every four cases of smokers' cough cleared on changing to Philip Morris. Why not observe the results for yourself?" Another Philip Morris ad published in *JAMA* in 1949 averred: "Why many leading nose and throat specialists suggest, 'Change to Philip Morris! . . .' "

109. Other companies employed different marketing techniques aimed at physicians. For example, Camel cigarettes paid tribute to medical pioneers and concluded: "Experience is the best teacher . . . [e]xperience is the best teacher in cigarettes, too." Old Gold reacted to early negative medical studies with the slogan: "If pleasure's your aim, not medical claim . . . ."

E. The Tobacco Companies' Conspiracy Began In Earnest In Order To Counter a Public Health "Scare" Over Tobacco.

110. The conspiracy and combination among the Tobacco Companies was formed no later than the early 1950s in response to the release of information about scientific research linking health hazards to tobacco use.

111. The Tobacco Companies knew well before the 1950s that tobacco use was deadly. But in 1952 Sir Richard Doll, an eminent British epidemiologist, issued a report stating that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes smoked. Brown & Williamson and the other Tobacco Companies were aware of the implications of this research. Indeed, a Brown & Williamson review of published statistical research, including the 1952 report by Doll, noted that the studies offered " 'frightening testimony' from epidemiology studies."

112. In December, 1953, Dr. Ernest Wynder of the Sloan-Kettering Institute published a report confirming that cigarettes cause cancer, based on experiments in which the skin of mice had been painted with residues of cigarette smoke. Dr. Wynder's report represented an experimental confirmation of earlier epidemiological studies linking tobacco with cancer. Following publication of the Wynder study, sales of tobacco products and prices of tobacco stocks fell. These events provoked an immediate response by the Tobacco Companies.

113. On December 14, 1953, Brown & Williamson President Timothy V. Hartnett circulated a memorandum to the other Tobacco Companies proposing that in response to the "health issue," the Tobacco Companies (a) assist "scientific research", with a group decision in

advance about "how to handle significantly negative research results if, as, and when they develop" and (b) carry out the best public relations campaign ever. Hartnett noted that no public relations firm "ha[d] ever been handed so real and yet so delicate a multimillion dollar problem."

114. The next day, the president of Philip Morris, RJR, American Tobacco, Brown & Williamson, Lorillard and U.S. Tobacco met at the Plaza Hotel in New York City. This meeting was unprecedented because the participants had previously been subject to the terms of an earlier dissolution decree and found guilty of price-fixing.

115. At the meeting, six of the Tobacco Companies conspired and agreed on the strategy to deal with the "health issue" – a strategy they have followed to this day. The strategy involved carrying out an illegal, fraudulent conspiracy involving violation of antitrust laws and other wrongdoing, as described in detail herein. Among other things, these defendants agreed to (a) stop competing with each other in making or developing less harmful cigarettes; (b) continue knowingly and willfully to engage in misrepresentations and deceptive acts by, among other things, denying knowledge that cigarettes caused disease and death and agreeing not to disseminate harmful information showing the destructive effects of nicotine and tobacco consumption; (c) shut down research efforts and suppress medical information that appeared to be adverse to the Tobacco Companies' position that tobacco was not harmful; (d) not compete with respect to making any claims relating to the relative health-superiority of specific tobacco products; and (e) confuse the public about, and otherwise distort, whatever accurate information about the harm-

ful effects of their products became known despite their conspiracy of deceit. Throughout the course of this conspiracy, the Tobacco Companies fraudulently promised the public and those involved in providing health care, including local governments such as the Public Hospital Districts, that they would accept paramount responsibility for the health of smokers, would fund independent research in an honest effort to discover the objective truth about the effects of smoking and chewing tobacco, and would disclose all information about smoking and health.

116. Defendant Hill and Knowlton, a public relations company, coordinated and later prepared a memorandum summarizing the meeting. According to the memorandum, each of the company presidents attending the meeting emphasized that he considered the program to be a "long term one" and the meeting participants were "emphatic in saying that the entire activity is a long-term, continuing program."

117. As stated in the Hill and Knowlton memorandum, the participants at this meeting recognized that "their own advertising and competitive practices have been a principal factor in creating a health problem" and that their agreement to "do something about it" might "very clearly fall within the purview of the anti-trust act." The memorandum thus set forth an explicit intent to violate the antitrust laws by suppressing competition based on claims of superior health benefits associated with an individual company's products. As a result and part of this anticompetitive intent and agreement, the Tobacco Companies suppressed research, development and marketing of less harmful products. To ensure compliance with this agreement, the Tobacco Companies further agreed not to compete based on claims

of superior health benefits in advertisements. By agreeing to restrict their advertising in this way, the Tobacco Companies ensured that marketing less harmful cigarettes would be unprofitable.

118. The participating cigarette executives recognized that the "problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future." The participating cigarette executives also "agreed to go along with a public relations program on the health issue" through an informal enterprise rather than a more formal association. The memorandum stated that "because of the anti-trust background, the companies do not favor the incorporation of a formal association. Instead, they prefer strongly the organization of an informal committee which will be specifically charged with the public relations function and readily identified as such."

119. The six Tobacco Companies involved at the time and Hill and Knowlton intended that Hill and Knowlton play a central role in the conspiracy. "The current plans are for Hill and Knowlton to serve as the operating agency of the companies, hiring all the staff and disbursing all funds."

F. The Tobacco Companies Undertook a Duty To Investigate and Tell the Truth About the Adverse Effects of Smoking, But Repeatedly Lied to the Public and Governmental Agencies, Breaching This Duty.

120. On January 4, 1954, Philip Morris, RJR, Brown & Williamson, American Tobacco, Lorillard and U.S. Tobacco, in furtherance of their conspiracy, organized and became members of the "Tobacco Industry

Research Committee" ("TIRC"). Liggett became a member in 1964 at the same time TIRC changed its name to the Council for Tobacco Research ("CTR"), one of the Defendants in this action. Similar "research" groups were formed in other countries. But TIRC, CTR and the other "research" groups were not true research groups; they merely used propaganda and public relations techniques to advance the Tobacco Companies' false claims that there was no known connection linking the use of tobacco products and nicotine consumption with disease.

121. On that same day, those Tobacco Companies (American Tobacco, Brown & Williamson, Lorillard, Philip Morris, RJR and U.S. Tobacco) announced the formation of TIRC in a statement deceptively entitled "A Frank Statement to Cigarette Smokers." These Defendants published the statement in newspapers in virtually every city with a population of 50,000 or more, reaching more than 43 million Americans out of a population at that time of approximately 150 million. The advertisement explicitly and specifically stated in part:

a. "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."

b. "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research."

c. "[T]here there is no proof that cigarette smoking is one of the causes" of lung cancer.

d. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

e. "We believe the products we make are not injurious to health."

f. "We always have and always will cooperate closely with those whose task it is to safeguard the public health."

g. "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."

h. "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

i. "In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition, there will be an Advisory Board of scientists disinterested in the cigarette industry."

j. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

122. Shortly after creating TIRC, the member cigarette manufacturers made an unambiguous pledge to the public. Liggett joined in this pledge in 1964 when it joined TIRC. The Tobacco Companies represented that they would, through TIRC, conduct and report objective and unbiased research regarding smoking and health. When they made this representation, Defendants knew or should have known that consumers and others throughout the country would consider the representation material to their decisions to purchase and smoke cigarettes. Defendants knew or should have known that

governmental authorities charged with protecting the public's health, including the Public Hospital Districts, would rely upon their statements. Similarly, Defendants also knew or should have known that responsible governmental agencies and authorities would fail to take or delay taking public health measures they otherwise would have taken had Defendants fulfilled their pledge. At that time, and continuing to the present, Defendants knew that their failure to fulfill the duty they undertook, and their other conduct as alleged herein, would result in increased health care costs to the Public Hospital Districts and other health care providers. Indeed, one of the purposes of Defendants' conduct was to distort and manipulate the health care market in order to deflect responsibility and financial obligations from themselves to others, including the Public Hospital Districts.

123. Defendants' undertakings in the "Frank Statement to Cigarette Smokers" were recognized as creating responsibility at the time that Statement was made. A Hill and Knowlton report to TIRC, dated April 28, 1955, admitted the special responsibility of TIRC and the Tobacco Companies

> The Tobacco Industry Research Committee first appeared before the public with an assurance that the industry itself would assume leadership in research into all aspects of tobacco use and health
>
> . . . .
>
> This brings with it a greater responsibility to the press and the public. The T.I.R.C. will have to live up to the expectations it has created on two fronts:
>
> First, by pushing ahead soundly, but steadily to get at the facts. . . .

Second, to report to the public where it stands in the search for the desired information about cancer.

124. Throughout the years, Defendants have many times repeated the promises and statements made in the "Frank Statement to Cigarette Smokers."

125. For example, the Tobacco Institute later published "A Statement About Tobacco and Health," which stated in part:

a. "We recognize that we have a special responsibility to the public—to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."

b. "We accepted this responsibility in 1954 by establishing the Tobacco Industry Research Committee, which provides research grants to independent scientists. We pledge continued support of this program of research until all the facts are known."

c. "Scientific advisors inform us that until much more is known about such diseases as lung cancer, medical science probably will not be able to determine whether tobacco or any other single factor plays a causative role—or whether such a role might be direct or indirect, incidental or important."

d. "We shall continue all possible efforts to bring the facts to light."

126. Similarly, on June 25, 1964, Bowman Gray, RJR's Chairman of the Board and a spokesman for the Tobacco Industry, testified before a committee of the U.S. House of Representatives that TIRC was free and

independent and that it had found nothing injurious in cigarettes, but that, if it did, TIRC would bring it out.

127. In 1970, at the direction of the other Defendants, TIRC placed advertisements throughout the United States in which it again falsely claimed that there was no known link between cigarettes and disease, despite decades of "totally independent research." The Tobacco Institute further stated: "The tobacco industry recognizes and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

128. On January 3, 1971, Joseph F. Cullman III, Chairman of Philip Morris, stated on a nationally televised broadcast that:

> We are also very concerned about the charges leveled against our product, and we are very anxious to do whatever we can to clear the air in this matter. We happen to be optimistic about the future, and we happen to feel that this is a great industry, and that this industry can face the future with confidence because when, as, and if any ingredient in cigarette smoke is identified as being injurious to human health, we are confident that we can eliminate that ingredient.

129. A 1979 Tobacco Institute reaffirmed the commitment of the Tobacco Industry:

> From the beginning the tobacco industry has believed the American people deserve objective, scientific answers.
>
> With this credo in mind, the tobacco industry stands ready today to make new commitments for additional valid scientific research that may shed light on the question of smoking and health.

130. In 1982, Edward A. Horrigan Jr., then Chairman of the Tobacco Institute's Executive Committee, publicly stated:

> After three decades of investigation and millions of dollars invested by the government, the Tobacco Industry and private organizations, the smoking and health controversy remains unresolved. The net result of all of this effort has been that no causal link between smoking and disease has been established. That is not merely the opinion of Tobacco Industry executives. That is scientific fact readily available to anyone willing to make an objective, unemotional study of the existing evidence.

131. In addition to the pledge to search for the truth about the health effects of smoking, Philip Morris made a pledge to stop making cigarettes if they proved harmful. In a 1972 *Wall Street Journal* article entitled "Defending the Weed," James Bowling, Philip Morris Vice President, vowed: "If our product is harmful, we'll stop making it. We now know enough that we can take anything out of our product, but we don't know what ingredients to take out."

132. An RJR executive wrote the following to a grade school principal in 1990, in response to a letter from fifth-graders:

> Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking. . . . We would appreciate your passing this information along to your students.

133. To this day, Defendants continue the deception, and unless Defendants are enjoined from it, this

deception will continue. In March 1998, Geoffrey Bible, Chairman and CEO of Philip Morris, stated under oath before a committee of the U.S. Senate that he does not believe that people die from smoking. Bible subsequently stated in open court that his company has a duty to inform the public of the risks of smoking, to make as safe a product as it possibly can, and to tell consumers what it knows about the risks of its products and that his company should be held accountable if it violated any one of those duties. Philip Morris has in fact violated all of those duties.

134. Bible's statements were false and designed to deceive. Bible knew at the time he made those statements that the Tobacco Companies (including Philip Morris) have in fact known and admitted in their internal records that smoking causes cancer and other diseases, but Philip Morris and the other Tobacco Companies continue to claim falsely that they do not know whether smoking does so.

G. Defendants Have Known for at Least Four Decades That Cigarettes and Other Tobacco Products Were Deadly and Addictive and That Tobacco Products and Defendants' Wrongful Conduct Would Increase Plaintiffs' Health Care Services Costs.

135. Despite Defendants' continued statements that it has not been proven that cigarettes are deadly or addictive, secret internal company documents released to the public only in the past or or so show that Defendants have known all along that tobacco causes disease and death and is addictive. Moreover, Defendants used their so-called research councils to propogate their misrepresentations. Recently released, secret internal documents show that the Tobacco Companies were aware from the outset that

they could neither reveal their knowledge that their products were unsafe nor develop less harmful alternatives without, in effect, indicting their own industry.

136. These documents indicate that during a month-long trip to the United States in 1958, three BATCO representatives met with over 20 American scientists and researchers, including at least 9 representatives of the U.S. tobacco industry and the Scientific Advisory Board of TIRC. The BATCO representatives later stated that all the tobacco company researchers with whom they met (and all but one of the outside people) "believed that smoking causes lung cancer."

137. They also found "general acceptance of the view that the most likely means of causation is that tobacco smoke contains carcinogenic substances present in sufficient quantity to promote lung cancer when acting for a long time in a sensitive individual."

138. Defendants have known for almost four decades, if not longer, that people continue to smoke because they are addicted. Recently disclosed documents concerning BATCO's "Project Hippo" indicate that, at least as early as 1961, the Tobacco Companies knew of nicotine's physiological and pharmacological effects. Project Hippo reports were circulated to TIRC, BATCO, Brown & Williamson and RJR. In 1962, Brown & Williamson's parent company conducted a meeting of its worldwide subsidiaries in Southampton, England. At this meeting, one researcher stated that "smoking is a habit of addiction" and "[n]icotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages." Several years later, in 1967, the researcher admitted that the company is in the "nicotine rather than the tobacco industry."

139. Those recently released secret documents indicate that Addison Yeaman, general counsel at Brown & Williamson, was aware in 1963 that the U.S. Surgeon General had concluded that cigarettes "cause, or predispose, to lung cancer" and that "[t]hey contribute to certain cardiovascular disorders" and "may well be truly causative in emphysema, etc." Yeaman concluded that "[w]e are, then, in the business of selling nicotine, an addictive drug."

140. A secret report distributed to Philip Morris executives in 1971 noted that only 28% of those who tried to quit were still nonsmokers eight months later. The report also described the effects of quitting:

> Even after eight months quitters were apt to report having neurotic symptoms, such as feeling depressed, being restless and tense, being ill-tempered, having a loss of energy, being apt to doze off, etc. They were further troubled by constipation and weight gains which averaged about five pounds per quitter. . . . This is not the happy picture painted by the cancer Society's anti-smoking commercial which shows an exuberant couple leaping in the air and kicking their heels with joy because they've kicked the habit. A more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline.

141. A 1972 RJR report concluded that people smoke to obtain "physiological satisfaction derived from the nicotine." A 1972 Philip Morris report presented at a CTR conference stated that the physiological effect of cigarettes is the "primary incentive; all other incentives are secondary"; "nicotine is the active constituent of cigarette smoke"; and "[w]ithout nicotine . . . there would be no smoking."

142. The report goes on to ask:

> Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction.
>
> The cigarette should be conceived not as a product but as a package. The product is nicotine. . . .
>
> Think of the cigarette pack as a storage container for a day's supply of nicotine. . . .
>
> Think of the cigarette as a dispenser for a dose of nicotine.

143. A 1956 confidential memorandum from a Philip Morris Vice President of Research and Development to top executives at the company regarding the advantages of "ventilated cigarettes" stated "Decreased carbon monoxide and nicotine are related to decreased harm to the circulatory system as a result of smoking. . . . [D]ecreased irritation is desirable . . . as a partial elimination of a potential cancer hazard."

144. In a March 1957 confidential report, a Brown & Williamson affiliate conducting research for the company reported that "[a]s a result of several statistical surveys, the idea has arisen that there is a causal relationship between ZEPHYR and tobacco smoking, particularly cigarette smoking." "ZEPHYR" was the Brown & Williamson secret code name for cancer.

145. A 1958 confidential memorandum to a Philip Morris Vice President of Research, who later became a member of its Board of Directors, stated that "the evi-

dence . . . is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors."

146. A 1961 confidential document presented to the Philip Morris Research and Development Committee by the company's Vice President of Research and Development included a section entiled "Reduction of Carcinogens in Smoke," stating in part as follows:

> To achieve this objective will require a major research effort, because Carcinogens are found in practically every class of compounds in smoke.
>
> This fact prohibits complete solution of the problem by eliminating one or two classes of compounds. The best we can hope for is to reduce a particularly bad class, *i.e.*, the polynuclear hydrocarbons, or phenols. . . .
>
> Flavor substances and carcinogenic substances come from the same classes, in many instances.

147. A 1961 confidential memorandum from a research consulting firm hired by Liggett stated that cigarette tobacco contains "biologically active materials" that are cancer causing, cancer promoting, poisonous, stimulating, pleasurable and flavorful.

148. A 1963 confidential memorandum from the Liggett consulting research firm stated:

> Basically we accept the inference of a causal relationship between the chemical properties of ingested tobacco smoke and the development of carcinoma, which is suggested by the statistical association shown in the studies of Doll and Hill, Horn, and Dorn with some reservations and qualifications and even estimate by how much the incidence of cancer may possibly be reduced if the carcinogenic matter can be diminished, by an apporpriate filter, by a given percentage.

149. Liggett withheld this information from the public, the health care industry, and health care providers, including the Public Hospital Districts, by presenting to the U.S. Surgeon General, in 1963, a report that focused on alternative causes of disease (such as air pollution, coffee, alcohol, diet, lack of exercise and genetics) and that criticized the alleged statistical association between smoking and diseases as "unreliably conducted" and "inadequately analyzed." The Liggett report concluded that the association between smoking and disease was inconclusive and was in fact due to other factors coincidentally associated with smoking.

150. A 1963 confidential memorandum to Philip Morris' President and CEO from the company's Vice President of Research describes components of cigarette smoke as "known carcinogens" and identifies a link between smoking and bronchitis and emphysema:

> Irritation problems are now receiving greater attention because of the general medical belief that irritation leads to chronic bronchitis and emphysema. These are serious diseases involving millions of people. Emphysema is often fatal either directly or through other respiratory complications. A number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than in the lung cancer field.

151. Brown & Williamson and its parent company BATCO researched the health effects of nicotine and were aware early on, as reported at a B.A.T. Group Research Conference in November 1970, that "nicotine may be implicated in the etiology [cause] of cardiovascular disease."

152. As early as 1962, Defendants recognized that they had to misrepresent what they knew about smoking and health and that they could not afford to develop a less harmful cigarette because to do so would indict their own products, causing the Tobacco Companies to be liable for health care costs associated with tobacco use.

153. That same year, Brown & Williamson's London-based parent company conducted a meeting of its worldwide subsidiaries in Southampton, England. A transcript of the meeting reveals the following regarding the health effects of smoking:

a. One research executive

> thought we should adopt the attitude that the causal link between smoking and lung cancer was proven because then at least we could not be any worse off.

b. Another researcher stated:

> [N]o industry was going to accept that its product was toxic, or even believe it to be so, and naturally when the health question was first raised we had to start denying it at the P.R. level. But by continuing that policy we had got ourselves into a corner and left no room to maneuver. In other words if we get a break through and were able to improve our product we should have to about-face, and this was practically impossible at the P.R. level.

c. The chairman of Brown & Williamson's British affiliate stated:

> [It] was very difficult when you were asked, as Chairman of a Tobacco Company, to discuss the health question on television. You had

not only your own business to consider but the employees throughout the industry, retailers, consumers, farmers growing the leaf, and so on, and you were in much too responsible a position to get up and say: "I accept that the product which we and all our competitors are putting on the market gives you lung cancer", whatever you might think privately.

d. The chairman of Brown & Williamson's British affiliate also stated that if the company manufactured safer brands,

how to justify continuing the sale of other brands? . . . It would be admitting that some of its products already on the market might be harmful. This would create a very difficult public relations situation.

e. Addison Yeaman, then General Counsel, suggested that Brown & Williamson "accept its responsibility" and disclose the hazards of cigarettes to the Surgeon General. He noted that this would allow the company to research and openly develop a "safer cigarette." Yeaman warned, however, that such disclosure would show jurors that the cigarette companies had known of the hazards of their products and had had the means to make safer cigarettes, but had not done so. Yeaman's suggestion for full disclosure was rejected.

154. In 1963, Brown & Williamson engaged in an internal debate over whether to disclose what it knew about the adverse effects of smoking to the Surgeon General, who was preparing his first official report on cigarettes. It was decided that the information would not be disclosed. Some of the documents generated by Brown & Williamson as part of this process were shared

with its London-based parent company, as well as other cigarette manufacturers and TIRC/CTR.

155. Philip Morris also concealed from the public its actual views of the research conducted outside the influence of the industry. In a 1971 memorandum, Dr. H. Wakeham, then Vice President of Research and Development, in referring to a recent study that found inhalation of cigarette smoke caused lung cancer in beagles, stated: "1970 might very properly be called the year of the beagle. Early in the year, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond Study." Although Wakeham criticized the mice cancer studies, he conceded that "the beagle test was a critical one . . . for the cigarette causation hypothesis."

156. Wakeham's memorandum demonstrates Philip Morris' approval of the industry's public dismissals of these independent studies: "The strong opposition of the industry to the beagle test is indicative of a new, more aggressive stance on the part of the industry in the smoking and health controversy. We have gone over from what I have called the 'vigorous denial' approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter-propaganda is a better stance than the former one."

157. Similarly, BATCO's internal view of the validity of mouse skin painting experiments differed markedly from the view expressed in public statements. Minutes from a confidential 1969 research conference stated:

> Historically, bioassay experiments were undertaken by the Industry with the object of clarifying the role of smoke constituents in pulmonary carcinogensis. The most widely used of these methods [was] mouse-skin painting. . . . In the

> foreseeable future, say five years, mouse-skin painting would remain as the ultimate court of appeal on carcinogenic effects.

158. Two years later, a Brown & Williamson public relations document stated:

> Much of the experimental work involves mouse-painting or animal smoke inhalation experiments . . . . [T]he results obtained on the skin of mice should not be extrapolated to the lung tissue of the mouse, or to any other animal species. Certainly such skin results should not be extrapolated to the human lung.

159. Notwithstanding the depth of knowledge held by Defendants and their own certainty that smoking caused disease and death, Defendants also understood that their deceptive public pronouncements had succeeded in defrauding the public, despite the warnings they had been required by law to give. For example, in an internal 1978 memorandum, Brown & Williamson acknowledged that "very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison." Defendants' disinformation and propaganda had, as they had intended, greatly reduced the impact of both the limited information they were required by law to disclose and similar information provided by others.

160. Because of the Tobacco Companies' secret internal research, Defendants' knowledge regarding the dangerous and deadly effect of smoking and chewing tobacco is and was superior to that of Plaintiffs, and public access to these facts is and was limited because such facts are and have been exclusively within Defendants' control.

161. For more than two decades, the Tobacco Companies have been aware of the link between their wrongful efforts to avoid responsibility for the health costs related to smoking, and the increasing burden on public hospitals to provide unreimbursed tobacco-related health care services to the Tobacco Companies' smokers. A November 1978 Philip Morris memo outlined the industry's acknowledgment of the link between smoking and increased public health costs and proposed that the industry prepare a strategy to avoid being held accountable:

> Health care costs are rising at an alarming rate . . .
>
> More industry antagonists are using an economic argument against cigarettes *i.e.*, cigarettes cause disease; disease requires treatment; major health costs are borne by the government the taxpayers pay in the end.
>
> . . . . [W]e must be prepared to counter this line of argument.

162. A June 1985 Tobacco Institute letter discussed legislative efforts in several states (including Washington) to "earmark cigarette excise taxes to cover the cost of care for indigent patients." Since those efforts failed, the Tobacco Industry became concerned that they may be held accountable by some other tax or mechanism. "Our lobbyists are doing a good job holding off the pack but, given the financial and political pressure for solutions . . . it may be just a matter of time before we lose one."

163. As the June 1985 Tobacco Institute letter makes clear, the primary goal of the Tobacco Industry in discussing solutions to the problem of funding indigent care was to develop a program that "keeps us out."

H. TIRC and CTR Were Tobacco Industry Controlled Propaganda Machines Used in Furtherance of the Conspiracy and Not "Independent" Scientific Research Councils as Fraudulently Misrepresented by the Industry.

164. To convince the public that they would use their best efforts to conduct independent and scientific research to determine and disclose the truth about the effects of smoking on health, the Tobacco Companies created TIRC and CTR and stated that their activities would be objective, independent and unbiased. But from the very beginning, industry documents show, these groups were neither independent, scientific nor objective. Instead, they were front groups for the Tobacco Companies, whose sole objective was to conduct a campaign of deceit, misrepresentation and misinformation directed at misleading the public about the health risks of smoking.

165. A Hill and Knowlton report to TIRC's chairman, entitled "Report of Activities Through 1954," stated:

a. TIRC was not independent and was not run by scientists, but was run by Hill and Knowlton: "Since the Committee had no headquarters and no staff, Hill and Knowlton, Inc. was asked to provide a working staff and temporary office space. As a first organizational step, public relations counsel assigned one of its experienced executives, W. T. Hoyt, to serve as account executive and handle as one of his functions the duties of executive secretary for the Tobacco Industry Research Council."

b. Hill and Knowlton helped select the Scientific Advisory Board, "proposed" the Scientific Director, and "handled liaison, agendas, organizational plans, business affairs, reports, and materials for meetings of the Tobac-

co Industry Research Committee [and] the Scientific Advisory Board, . . . in addition to developing operating procedures for the research program."

c. Hill and Knowlton used TIRC to mislead the public, rather than to discover and bring the truth to light. In essence, TIRC publicized any favorable studies and buried any unfavorable ones.

d. TIRC transformed an obscure scientific report favorable to the Tobacco Companies into national headline news and used other efforts to influence and bias the media's treatment of the issues about smoking and health. Apparently, on information and belief, TIRC ghost-scripted ostensibly objective news stories.

e. In many instances, TIRC worked behind the scenes to influence the content of individual articles. In one case, TIRC's intervention resulted in extensive revisions to a story in *Cosmopolitan* that had already been set in type.

f. Freelance authors were hired to write favorable articles for TIRC: "Especially-written articles are being developed that can be used or adapted for use in various media receptive to or seeking material relating to the subject. . . . To achieve this objective more quickly and effectively, the free lance services of qualified science writers are being used."

166. This Hill and Knowlton report was sent with a cover letter indicating that the report was "highly confidential" and warning that "no additional copies be made and that this copy not be placed in files."

167. On July 31, Hill and Knowlton wrote a confidential report concerning TIRC's success in turning around the perception that cigarettes caused disease:

A FORWARD LOOK

Although the Industry has been bedeviled by sensational headlines generated often by publicity seeking researchers and a seeming revival of the anti-cigarette crusade, the trend is beginning to turn. In 1953, no voice was being raised on behalf of the industry. Press comment was almost entirely limited to a reflection of unproven theories which most people were accepting as proven facts. No balancing information was being made available.

The progress of [TIRC]'s program is bringing greater acceptance of the Industry's sincere efforts. The publicity accompanying each step taken so far by [TIRC], particularly since the selection of the Scientific Director and the Scientific Advisory Board, has helped bring understanding that the charges against tobacco are not proven and are not joined in by a large body of scientific opinion. The bulk of editorial comment now appearing approves and, at times, applauds the action of the industry.

168. Another Hill and Knowlton memorandum describing projects from August through September 1954 indicated that TIRC's Scientific Director and Chairman had met with publishers and repeated the promise that the Tobacco Companies intended to support a "long-range . . . research program devoted primarily to the public interest." This statement was made to publishers, presidents, or board chairmen of the *New York Times,* the *New York Herald Tribune,* Scripps-Howard Newspapers, Hearst Consolidated Publications, and Luce Publications.

169. The memorandum describes how TIRC influenced television shows:

> A conference was held with Edward R. Murrow, Fred Friendly, his producer . . . , at [TIRC] offices in the Empire State Building. . . . The Murrow staff emphasized the intention to present a coldly objective program with every effort made to tell the story as it stands today, with special effort toward balanced perspective and concrete steps to show that the facts still are not established and must be sought by scientific means such as the research activities [TIRC] will support. Mr. Murrow was assured of continued cooperation from [TIRC] to the extent possible under the scope of the TIRC program.

170. On April 28, 1955, Hill and Knowlton wrote a confidential "Public Relations Report" to TIRC. The report found that after a year of intensive public relations activities, "progress has been made":

> The first "big scare" continues on the wane. There is much general awareness of the big IF factors involved. . . . Treatment of the cigarett-health issue in public media continues to improve from the Tobacco Industry Research Committee point of view. Even adverse stories now tend to carry modifying statements. Positive stories are on the ascendancy.

171. Many other confidential internal company documents indicate awareness that the so-called "research" councils were intended not to find out and provide the truth or objective facts, but to play a propaganda and public relations role, as the following examples demonstrate:

> a. "CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry shield in 1954. That was the year statistical accusations relating smoking to

diseases were leveled at the industry; litigation began; and the Wynder/Graham reports were issued. CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. . . . [T]he public relations value of CTR must be considered and continued. . . . It is very important the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed."

b. "CTR is [the] best & cheapest insurance the Tobacco Industry can buy and without it, the Industry would have to invent CTR or would be dead."

c. "Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. . . . In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious [*sic*] strategy."

d. "Historically, it would seem that the 1954 emergency was handled effectively. From this experience there arose a realization by the tobacco industry of a public relations problem that must be solved for the self-preservation of the industry."

e. "To date, the TIRC program has carried its fair share of the public relations load in providing materials to stamp out brush fires as they arose. While effective in the past, this whole approach requires both revision and expansion. The public relations program . . . was like the early symptoms of diabetes – certain dietary con-

trols kept public opinion reasonably healthy. When some new symptom appeared, a shot of insulin in the way of a news release . . . kept the patient going."

f. "When the products of an industry are accused of causing harm to users, certainly it is the obligation of that industry to endeavor to determine whether such accusations are true or false. Money spent for such purpose should not be regarded as a charitable contribution but as a business expense – an expense necessary to keep that industry alive. In view of the billions of dollars of annual sales of our industry our expenditures for health research has been of a minimal order."

g. "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts – litigation, politics, and public opinion. While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not – nor was it intended to be – a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of creating doubt about the health charge without actually denying it."

h. "In the cigarette controversy, the public – especially those who are present and potential supporters (*e.g.*, tobacco state congressmen and heavy smokers) – Must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor."

I. Defendants Fraudulently Hid, Concealed, and Destroyed Research.

172. As discussed above, in many statements published in and following 1954, Defendants represented themselves as intending to discover and disclose the truth about smoking and health. Internal company documents reveal that in this period Defendants suppressed and concealed a great deal of research and information that was contrary to their public positions.

173. For Example, Brown & Williamson continued to conduct and conceal biological research confirming that tobacco products cause adverse health effects. The more sensitive research was often undertaken by Brown & Williamson's British affiliate, acting on behalf of Brown & Williamson, including research at a laboratory called Harrowgate. This laboratory performed work for a number of cigarette manufacturers, and some of this research was shared with these other companies and TIRC. Brown & Williamson's use of the code name "ZEPHYR" to refer to cancer helped suppress its confidential findings that there is a "causal relationship" between "ZEPHYR and tobacco smoking."

174. In the late 1960s, RJR operated a state-of-the art laboratory in Winston-Salem, nicknamed "the mouse house." There, scientists conducted research with mice, rats, and rabbits and began to uncover promising avenues of investigation into the mechanisms of nicotine-related diseases. One day in 1970, this entire research division was disbanded and all 26 scientists were fired without notice. RJR's in-house attorneys had collected dozens of research notebooks from the biochemists several months before the firings. These research notebooks remain undisclosed.

175. In the early 1980s, researchers working at a Philip Morris laboratory in Richmond further confirmed the addictive nature of nicotine and worked to develop a synthetic form of nicotine that would avoid its cardiovascular complications. The research was conducted by Victor J. DeNoble and his colleague Paul C. Mele. The research was so secretive that laboratory animals were brought in at night under cover.

176. The researchers discovered that nicotine demonstrated addictive qualities and that the animals self-administered the substance by pressing levers to obtain nicotine. The synthetic or artificial forms of nicotine or nicotine analogues under research affected the brain much like nicotine, without the harmful cardiovascular effects of nicotine or tobacco. Rats using the analogue behaved as though they had a nicotine "high," but did not show signs of heart distress, such as rapid heart beat.

177. In June 1983, DeNoble was called to the Philip Morris headquarters in New York to brief top executives. After the meeting, company lawyers visited the lab and reviewed research notebooks. There were discussions of shifting the research out of the company, perhaps to DeNoble and Mele as outside contractors or to a lab in Switzerland, to distance Philip Morris from the results.

178. In April 1984, Philip Morris representatives instructed the researchers to stop work, kill all the animals, turn in their security badges, and withdraw a paper on the addictive qualities of nicotine that had been accepted for publication by a scientific journal. Philip Morris closed the laboratory, fired the researchers, forced them to agree to remain quiet about their work, and threatened them with legal action if they published their work.

179. The researchers remained silent about their work until testifying in 1994 before a Congressional committee in Washington, D.C.

180. Defendants did not merely conceal all negative research information, but they also assigned all research information indicating that cigarette smoking is addictive to a so-called "Special Projects" division of TIRC, where the information was secreted from the public and concealed from discovery in litigation against the Tobacco Companies by improper assertion of attorney-client privilege.

181. The purpose of the "Special Projects" division was to choose selectively and with bias research projects regarding the links between smoking and disease in order to develop expert witnesses for defense purposes in tort suits against the Tobacco Companies. Consistent with this purpose, the Tobacco Companies' attorneys were substantially involved in strategic and specific decision-making within the "Special Projects" division in order to hide adverse information and evidence from the public through spurious claims of attorney-client privilege. For example, a memorandum from 1981 explained, "Difference between CTR and Special Four (lawyers' Projects) Director of CTR reviews special projects – if project was problem for CTR, use Special Four."

182. The Tobacco Companies have been successful in using the CTR Special Projects division to conceal harmful information. Research from the Special Projects division remains shielded from public scrutiny. Individual companies furthered the conspiracy by shielding company documents with bogus claims of attorney-client privilege and through tactics such as that undertaken by Brown & Williamson, which over the years has transferred

highly relevant documents (described disingenuously but ironically as "deadwood") to its British parent company, B.A.T., so that they would not be discovered in legal proceedings in the United States.

J. Defendants Misrepresented Health Claims.

183. As discussed below, Defendants restrained, concealed, and suppressed research and the potential development, marketing, and manufacturing of less harmful and less addictive cigarettes. Despite their ability to produce less harmful cigarettes, Defendants did not market such products, except in limited test markets, which they later abandoned. Instead, Defendants fraudulently promoted filtered and low-tar cigarettes as safer or healthier, which was untrue.

184. During the early 1950s, when the first studies implicating smoking as a cause of lung cancer were being publicized, cigarette sales fell for the first time since the depths of the Great Depression. Defendants responded with massive advertising and public relations campaigns claiming that smoking filtered cigarettes was a reasonably safe alternative to quitting. In 1950, only about 1% of cigarettes were sold with filters. By the end of that decade, more than half of all cigarettes were sold with filters.

185. For example, Philip Morris ads claimed that "no other popular filter cigarette delivers less nicotine and tar." Its Viceroy cigarettes were promoted with the "health guard filter." Some of the claims included:

> New health guard filter makes Viceroy better for your health; new king-size Viceroy gives you double-barreled health protection. Leading N.Y. doctor tells his patients what to smoke! Filtered cigarette smoke is better for health.

> Prominent physician tells patients – *Smoke Viceroy Filter-Tip Cigarettes.* The nicotine and tars trapped by the *Viceroy Filter* cannot reach mouth, throat, or lungs. You can see the health guard filter discolor from nicotine and tars which might otherwise be drawn into your mouth, throat, and lungs.

186. In 1952, Lorillard introduced Kent cigarettes with the "micronite" filter. Lorillard's ads claimed: "Don't be misled by conflicting claims. . . . Today as before you get less tars and nicotine in Kent than any other leading cigarette." It was represented that the micronite filter removed seven times more tar and nicotine than any other cigarette. Lorillard stated that the material in the Kent filter was developed for gas masks during the war and was at that time being used to remove radioactive particles from the air at atomic power plants. In an ad, Lorillard purportedly cited an article in the *Journal of the American Medical Association:*

> These findings – which show the effects of various types of cigarettes on the human system, and *put Kent in a class all by itself where health protection is concerned* – have been made available to doctors. . . . It is known *and provable* that there is only one way to take the irritants out of tobacco smoke *in sufficient quantity for the sensitive smoker.* That is to take them out with a filter . . . [Kent is] a really good smoke and real protection. [Emphasis in original.]

187. In the first weeks after Kent cigarettes were introduced, sales greatly exceeded Lorillard's expectations. In the early months, the biggest problem faced by the company was keeping dealers supplied.

188. Between 1952 and 1957, more than a dozen filter cigarettes were introduced. In 1952, filter cigarettes accounted for less than 1% of the market. By 1958, there were filters on more than 40% of cigarettes. The decline in cigarette sales of 1953 and 1954 was reversed, and by 1957 cigarette sales exceeded the 1952 record.

189. There is no evidence that low-tar/low-nicotine cigarettes provide a significant health benefit or are materially less addicting. In most instances, low-tar/low-nicotine cigarettes increase the risk of emphysema, heart disease, and other diseases caused by smoking and are just as addictive as ordinary cigarettes. This is because smokers of low-tar/low-nicotine cigarettes tend to smoke more, inhale more deeply, and hold the smoke in their lungs longer in order to maximize their nicotine intake.

190. Most smokers compensate for the alleged reduced nicotine delivery from filtered cigarettes by smoking more. Since the advent of filters, average daily consumption for the typical smoker has increased from 20 to 30 cigarettes. Thus, any marginally reduced lung cancer risk from most conventional filters has been achieved at the cost of a greater risk of emphysema, heart disease, stroke, and other diseases.

191. The Tobacco Companies designed their so-called "light" products so that advertised tar and nicotine labels understate the amounts of tar and nicotine actually ingested by human smokers. Such design features include a technique called filter ventilation in which nearly invisible holes are drilled in the filter paper or the filter paper is made more porous. Predictably, many smokers of advertised low-tar and nicotine cigarettes block the tiny, laser-generated perforations in ventilated filters with their fingers or lips, thereby resulting in

greater tar and nicotine yields to those smokers than those measured by the FTC smoking machine.

192. The Tobacco Companies know that the ability to block ventilation holes allows smokers to "compensate" for nicotine losses that would otherwise be caused by tar-reducing modifications. The Tobacco Companies have studied smoker compensation in order to design cigarettes that allow smokers to compensate for lower nicotine yields. One such design feature is known as "elasticity." This refers to the ability of a cigarette, whatever its FTC-measured nicotine yield, to deliver enough smoke to permit a smoker to obtain the nicotine he needs, e.g., through more or longer puffs or by covering ventilation holes.

193. Industry studies show that smokers tend to ingest close to the same amount of nicotine from each cigarette despite differences in yield as measured by the FTC smoking machine. In a 1974 BATCO conference, researchers described the result of one such study:

> The Kippa study in Germany suggests that whatever the characteristics of cigarettes as determined by smoking machines, the smoker adjusts his pattern to deliver his own nicotine requirements (about 0.8 mg. per cigarette).

194. Smokers' compensation to obtain adequate nicotine also results in the delivery of more tar than in the FTC test measure.

195. The use of ammonia is another method used by the Tobacco Companies to reduce the FTC-measured tar and nicotine levels in their cigarettes over the past two decades while still furnishing smokers with sufficient nicotine delivery. According to John Kreisher, a former associate scientific director for CTR, "Ammonia helped

the industry lower the tar and allowed smokers to get more bang with less nicotine. It solved a couple of problems at the same time."

196. But the use of the more potent "free" nicotine that ammonia helps release, as opposed to the slower acting salt-bound nicotine, also serves to increase the amount of nicotine delivered to smokers of "light" cigarettes. An ammoniated cigarette that delivers more potent nicotine to smokers measures the same as a cigarette with no such additives.

197. The Tobacco Companies maintain that nicotine levels follow tar levels. In the words of Dr. Alexander Spears, Vice Chairman of Lorillard, in his 1994 testimony before the Waxman Subcommittee – "[n]icotine [levels] follow the tar levels," and the correlation between the two "is essentially perfect" and "shows that there is no manipulation of nicotine." Spears neglected to mention to Congress that in a 1981 study not intended for public release, he had explicitly stated that low-tar cigarettes use special blends of tobacco to keep the level of nicotine up while tar is reduced: "[T]he lowest tar segment [of product categories] is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine." RJR, Lorillard, American Tobacco, and the Tobacco Institute have similarly represented to the public and to the FDA that the nicotine levels in their products are purely a function of setting the tar levels of such products.

198. American Tobacco told the Waxman Subcommittee in an October 14, 1994 letter that "nicotine follows 'tar' delivery, *i.e.*, high 'tar' – high nicotine, low 'tar' – low nicotine. . . . Nicotine is neither adjusted nor altered to compensate for losses inherent in the manufacturing process." Internal company documents reviewed

by the Waxman Subcommittee show, however, that American Tobacco's experimentation with adding nicotine to its tobacco was extensive – extensive enough for American Tobacco executive John T. Ashworth to instruct employees in a confidential memorandum: "In the future our use of nicotine should be referred to as 'Compound W' in our experimental work, reports, and memorandums, either for distribution within the Department or for outside distribution."

199. Recent tests conducted at the direction of the FDA show that the low-tar brands actually have more nicotine by weight than the non-"light" brands. The high level of nicotine found in lower tar cigarettes seriously misleads consumers and renders false the Tobacco Companies' claim of an "essentially perfect" correlation between reduced tar and nicotine levels. According to the FDA, the Tobacco Companies use a combination of the methods described above to boost nicotine delivery to compensate for nicotine losses from the application of tar-reducing design modifications. The Tobacco Companies thus maintain, by means of nicotine addiction, a continuing market for a product that consumers are misled to believe contains less of each of the harmful ingredients in regular cigarettes.

200. Against this mounting body of evidence of their manipulation and control of nicotine levels in cigarettes, the Tobacco Companies continue to deny to the public, and to Congress under oath, that they manipulate and control nicotine levels. Top executives from Philip Morris, RJR, Lorillard, Liggett and Brown & Williamson testified before Congress in April 1994 that their respective companies do not manipulate nicotine, add it, independently control it, restore it during the manufacturing process, or otherwise achieve a mini-

mum level of nicotine in their products. Thomas E. Sandefur, Jr., CEO of Brown & Williamson, has admitted that the company controlled nicotine, but in a now familiar refrain, he stated that the company did so only for "taste."

201. A primary purpose and effect of these decades-old denials and the suppression of scientific testing has been that governmental entities did not act earlier and more aggressively to reduce cigarette smoking and limit cigarette sales; nor did the Public Hospital Districts act earlier and more aggressively to reduce cigarette smoking by their patients. Actions that would have reduced smoking and limited sales were not taken because Defendants concealed and suppressed information that would have formed the basis for action.

202. CTR concluded in 1974:

> The public should be informed that based on present knowledge, cigarettes with either reduced "tar" or reduced gas vapor constituents cannot be considered safe, that is, smoking these cigarettes does not eliminate damage to health such as risk of lung cancer.

203. The public was not so informed. Despite their knowledge, the Tobacco Companies continue to market low-tar/low-nicotine cigarettes as if the effects of the tar and nicotine were lowered, when they are not.

K. The Conspiracy To Suppress Research and Product Development of Less Harmful or Less-Addictive Tobacco Products

204. As early as 1953, a Tobacco Industry research director stated: "Boy, wouldn't it be wonderful if *our* company was first to produce a cancer free cigarette. What we could do to competition!" Nevertheless, the

Tobacco Companies recognized that the nature of the dangers posed by their products already in the market was such that a conspiracy of silence and inaction was preferable and that it was important, in the words of Hill and Knowlton, to "develop some understanding with companies that on *this* problem, none is going to seek a competitive advantage by inferring to its public that *its* product is less risky than others." As a result, beginning in approximately 1953, the Tobacco Companies conspired by way of a so-called "gentlemen's agreement"to suppress independent research and development on the issue of smoking and health.

205. A 1968 internal Philip Morris draft memorandum specifically referred to the 1953 "agreement" not to compete, referring to possible violations of the "gentleman [*sic*] agreement" in the form of independent research by some of the major companies. The memorandum stated: "We have reason to believe that in spite of gentlemans [*sic*] agreement" in the form of independent research by some of the major companies. The memorandum stated: "We have reason to believe that in spite of gentlemans [*sic*] agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities." Although conspirators seldom live by the terms of their unlawful agreements, as discussed below, in the final analysis, none of the Tobacco Companies ever commercially marketed a truly less harmful cigarette because any company that attempted to do so ultimately succumbed to pressure imposed by the other co-conspirators.

206. Describing a meeting of the research directors of the Big Six manufacturers, a 1968 memorandum to the CEO of Liggett stated that with regard to the

topic of smoking and health, there was "a general feeling that an industry approach as opposed to an individual company approach was highly desirable."

207. Following the 1953 "gentlemen's agreement," although the companies competed on product features such as filters and the levels of tar and nicotine – none of which actually reduced the health risks presented by tobacco – the Tobacco Companies adhered to their agreement by not introducing less harmful cigarettes. During the 1970s and 1980s, Defendants continued to suppress information about the harmful effects known to them about nicotine and tobacco and continued instead to associate smoking with glamorous, athletic, and successful lifestyles.

208. Significantly, each tobacco company adhered to the conspiracy even while understanding that developing a less harmful cigarette would be to its own competitive advantage in the marketplace.

209. In 1958 an internal proposal was presented to the Director of Research and Development at Philip Morris to study ways of "identifying carcinogenic substances as well as all substances in cigarette smoke that are irritating or are known to produce undesirable physiological effects, and find means of removing them. If the latter appears to be impossible, let us develop a non-tobacco cigarette which doesn't have them to begin with." The author of the proposal stated: "I'll bet that the first company to produce a cigarette claiming: a substantial reduction . . . in tars and nicotine, or an ersatz cigarette whose smoke contains no tobacco tars, and with good smoking flavor, will take the market."

210. Despite the prospect of taking the market, Philip Morris did not pursue the removal of carcinogens.

211. Similarly, in 1966, the Director of Research and Development at Lorillard wrote to the company's president, stating:

> It is thought that the development of a cigarette, the smoke from which gives little or no tumorigenic response would be regarded as a highly significant development by the scientific community . . . undoubtedly such a product would place the corporation in a highly enviable position, and in the writer's opinion a two or three fold increase in sales could result within a short period . . . . It is unrealistic to envision a cigarette sales monopoly in that such a product would be effectively duplicated by competitors in a short time. On the other hand, if we fail to pursue this research and/or a competitor marketed a cigarette whose smoke condensate gives little tumorigenic response, the writer is of the opinion that a significant sales loss could result.

212. Despite the marketing opportunity outlined in the above memorandum, neither Lorillard nor its competitors violated the conspiracy and marketed a less harmful cigarette.

213. A June 21, 1954 Hill and Knowlton memorandum states:

> Early in the life ot [TIRC], it was accepted as a basic principle that every effort should be made to avoid stimulating more adverse publicity and controversy on the subject of tobacco and health.
>
> That principle has been and will continue to be carefully adhered to in the work carried on for the Committee.

214. The Tobacco Companies were aware that the agreement creating TIRC restrained competition by

requiring each of the Tobacco Companies to forego individual commercial advantage so that the conspiracy would hold. As Philip Morris noted, similar agreements in other countries restrained competition: "On the Continent individual companies and monopolies have agreed to pool research on the health question, thereby reducing it as a basis for competition." BATCO Chairman Sir Charles Ellis said, "If this Company makes any significant scientific discovery clearly relevant to health it will share its knowledge with its co-members [in a U.K. committee of tobacco manufacturers] and not seek to obtain competitive commercial advantage."

215. Defendants' intentional agreement not to compete in the health care segment and to suppress truly healthier alternative products is shown in the transcript of a 1962 meeting of Brown & Williamson companies in Southampton, England, in which the chairman remarks that, if the company manufactured safer brands, "how to justify continuing the sale of other brands? . . . It would be admitting that some of its products already on the market might be harmful. This would create a very difficult public relations situation."

216. U.S. Tobacco terminated an employee and apologized to the Big Six after the employee was quoted in a *New York Post* article to the effect that smokeless tobacco is less dangerous than smoking, thus demonstrating to its co-conspirators its support for the conspiracy. Ernest Pepples of Brown & Williamson reported this in a memo, in which he wrote that he had been called by U.S. Tobacco's General Counsel, Jim Chapin. Pepples stated:

> Chapin says the statements quoted were unauthorized and do not represent his company's

> views. He has asked me to extend US Tobacco's apology to each of the cigarette companies and advised me that the individual quoted in the article is no longer employed at US Tobacco. Chapin says US Tobacco has instituted smoking and health seminars throughout the company.

217. On information and belief, this reference to "smoking and health seminars" referred to U.S. Tobacco's instructions to employees not to disseminate truthful information about the adverse health effects of nicotine tobacco products.

218. All Defendants were keenly aware of the risk to the Tobacco Companies if any of them sought a competitive advantage by developing and marketing a truly safer or less addictive product. The risk was avoided by their agreeing not to compete on that basis.

219. For example, in 1970, an outside lawyer in a firm specializing in representing the Tobacco Industry wrote to DeBaun Bryant, General Counsel at Brown & Williamson, that explicit references to research into safer products, products which are less biologically active, or "healthy cigarettes":

> constitute a real threat to the continued success in the defense of smoking and health litigation. Of course, we would make every effort to "explain" such statements if we were confronted with them during a trial, but I seriously doubt that the average juror would follow or accept the subtle distinctions and explanations we would be forced to urge. . . . [E]mployees in both companies [Brown & Williamson and BATCO] should be informed of the possible consequences of careless statements on this subject.

220. The Cigarette Advertising Code adopted by Defendants was another mechanism used to enforce the illegal agreement not to compete by disclosing truthful information about nicotine tobacco products. Among other provisions, it prohibits health claims in advertisements released by the Tobacco Companies unless the "Code Administrator," to whom all cigarette advertisements are required to be submitted, approves of the advertisement. The Code provided a mechanism to monitor and police Defendants' illegal agreement and to create a disincentive for research, development and marketing of a less harmful cigarette.

221. The Tobacco Companies were also aware that consumer demand would support less harmful products. The Tobacco Companies knew that demand had shifted to filter and low-tar/low-nicotine cigarettes in response to the positioning of these products as safer alternatives. But the Tobacco Companies knew that "the smoker of a filter cigarette [claiming reduced tar] was getting as much or more nicotine and tar as he would have gotten from a regular cigarette. He had abandoned the regular cigarette, however, on the ground of reduced risk to health." The Tobacco Companies recognized a difference between "health-oriented" cigarettes, which were never marketed on a wide basis, and "health-image" cigarettes, such as low-tar/low-nicotine products. The latter were a marketing tool intended to give the illusion of a safer product. That illusion was a lie.

L. Suppression of Less Harmful Cigarettes Pursuant to the Conspiracy

222. Several Defendants did in fact conduct some research to develop less harmful cigarettes and nicotine alternatives. But Defendants conspired and acted in

concert to suppress and exclude such products from the market.

223. For example, a 1961 internal Philip Morris R&D presentation lists numerous compounds in cigarette smoke that have been identified as carcinogens, notes "that smoking produces pleasurable reactions or tranquility and that this is due in part to nicotine," and then outlines an R&D program to develop "a medically acceptable cigarette," which includes "reduction of the general level of carcinogenic substances in smoke (but without complete elimination of more than a handful)."

224. Philip Morris concluded:

> A medically acceptable low-carcinogen cigarette may be possible. Its development would require **TIME, MONEY, UNFALTERING DETERMINATION.**

225. Philip Morris developed a less harmful cigarette and then suppressed commercial marketing of the product. Philip Morris referred to this cigarette as having "superior physiological performance." According to a confidential memorandum to the Board of Directors, Philip Morris knew that there would be competitive pressure to produce "less harmful" cigarettes if one were to be marketed. The memorandum stated: "Our philosophy is not to start a war, but if war comes, we aim to fight well and to win." Another Philip Morris secret document stated that "after much discussion we decided not to tell the physiological story which might have appealed to a health conscious segment of the market. The product as test marketed . . . was unacceptable to the public ignorant of its physiological superiority."

226. As discussed above, in the early 1980s, Philip Morris researchers in Richmond worked to develop a

synthetic form of nicotine that would avoid its cardiovascular complications, until Philip Morris abruptly shut down the research operation.

227. RJR's efforts to develop a less harmful cigarette also focused on delivering nicotine to the consumer without the harmful constituents of tobacco smoke. In the late 1980s, RJR developed and test-marketed "Premier," a cigarette that heated but did not burn tobacco. This made for a healthier nicotine delivery system. A 1987 memorandum concerning Premier, from one of RJR's outside law firms, warned that this smokeless cigarette could "have significant effects on the tobacco industry's joint defense efforts" and that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them." Consistent with the conspiracy, RJR's test marketing of Premier did not include information about the relative harmfulness of Premier. RJR, having agreed not to compete on the basis of health and safety, concluded that Premier was a failure.

228. Liggett researched and developed a less harmful cigarette, but did not market the product, recognizing that doing so would "indict" the whole industry. Liggett was also aware that Philip Morris would "clobber" Liggett for violating the agreement not to compete based on health claims or development of a less harmful cigarette. Liggett's less harmful cigarette research project, called XA, was initiated in 1968 and, after a minimal expenditure of only $14 million, Liggett found that "[c]igarette tar has been neutralized" and there was "[n]o evidence for new or increased hazard."

229. Nevertheless, these cigarettes – which were believed by Liggett to be of "commercial quality" –

were not commercially marketed, because of Defendants' conspiracy. James Mold, assistant director of research at Liggett during the project, recently testified that Liggett aborted the development and marketing of a less harmful cigarette in the following terms:

a. Mold stated that the XA project produced a safer cigarette:

> We produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity.

b. Mold testified that after 1976, all meetings on the project were attended by lawyers, lawyers collected all notes after the meetings, and documents were directed to the law department to maintain secrecy through bogus assertions of the attorney-client privilege. He stated:

> Whenever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again.

c. Mold testified that he was at a conference of scientists in Buenos Aires prepared to present his research regarding a less harmful cigarette when he received a "frantic call" from legal counsel and was told not to present the paper or issue the press release. He was instructed not to publish his results in the *Journal of Preventive Medicine.*

d; Mold was asked why Liggett did not market a less harmful cigarette. He answered:

> Well, I can't give you, you know, a positive statement because I wasn't in the management circles that made the decision, but I certainly had

> a pretty fair idea why. . . . [T]hey felt that such a cigarette, if put on the market, would seriously indict them for having sold other types of cigarettes that didn't contain this, for example.
>
> . . .
>
> At a meeting we held in . . . New Jersey at the Grand Met headquarters . . . the various legal people involved and the management people involved and myself were present. At one point Mr. Dey who at that time, and I guess still is the president of Liggett Tobacco, made the statement that he was told by someone in the Philip Morris company that if we tried to market such a product that they would clobber us.

230. Brown & Williamson also developed a less harmful cigarette that it did not market. Brown & Williamson's Project "Ariel" used a heating, as opposed to a burning, system. Its Project "Janus" was intended to identify hazardous components of cigarette smoke so that they could be removed. Jeffrey Wigand, former Vice President for Research and Development for Brown & Williamson, stated that he was instructed by the company's president to abandon all efforts to develop a safer cigarette. Any research on a safer cigarette would clearly expose every other product as being unsafe and, therefore, present a liability issue in terms of any type of litigation."

231. In a 1976 report, Brown & Williamson concluded:

> Today we have all the information necessary to manufacture reduced hazard cigarettes. It is possible to strip and extend tobacco to the point that the resulting cigarette is reduced to a minimum configuration: emitting essentially hot air.

232. Brown & Williamson also conducted research on tobacco substitutes or analogues, as did a number of the other companies. These substitutes were sought as a means to duplicate some of the characteristics of nicotine without toxic or harmful effects. For example, Brown & Williamson's parent developed "Batflake," a tobacco substitute. Laboratory tests showed that use of Batflake reduced a number of the harmful effects of smoking in direct proportion to the amount used in a cigarette. So far as is known, none of the substitute products were ever marketed in the United States.

233. In 1980, Brown & Williamson and its parent company abandoned the less harmful product search, describing it as "[d]angerous area [research into irritation and smoke inhalation]. Please do not publish or circulate. No more work is needed on biological side."

234. Defendants collectively abandoned their efforts to make less harmful or less addictive cigarettes commercially available because of their conspiracy, which began during the 1950s and continues to this day. There was never any "war" within the Tobacco Industry over who would produce a less harmful cigarette. To this day, Defendants have continued to observe the terms of their conspiracy, in accordance with which no Defendant has marketed a less harmful cigarette. Defendants' research efforts confirm, however, Defendants knew that nicotine tobacco products were harmful, deadly and addictive.

M. Defendants Manipulated Nicotine To Assure Addiction.

235. The Tobacco Companies were well aware that they were not, as their propaganda suggested, in the business of selling a natural agricultural product. Rather, they

are in the business of selling a highly addictive, lethal drug the doses of which they manipulated through the manufacturing process. For example:

- A 1967 Brown & Williamson memo noted that "[w]e are in a nicotine rather than a tobacco industry."
- A 1980 BATCO memo concluded: "B.A.T. should learn to look at itself as a drug company rather than as a tobacco company."
- A 1967 Brown & Williamson memo found: "Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison."
- A 1991 RJR memo echoed: "We are basically in the nicotine business."

236. Another BATCO memorandum reported:

> A cigarette as a **drug administration system** for public use has very, very significant advantages: (1) **Speed.** Within 10 second [*sic*] of starting to smoke, nicotine is available **in the brain.** Before this, impact is available giving an instantaneous catch or hit, signifying to the user that the cigarette is "active." (2) **Flavor,** also is immediately perceivable to add to the sensation. Other "**drugs**" such as marijuana, amphetamines, and alcohol are slower and may be mood dependent.

(Emphasis supplied.)

237. A 1969 Philip Morris memorandum cautioned:

> I would be more cautious in using the pharmaco-medical model – do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls.

238. One BATCO employee recognized this dilemma in notes of a 1983 meeting:

> If any future study showed that nicotine either was, or was not, associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails, we cannot win situation!)

239. Another BATCO memo stated:

> Taking a long-term view, there is danger in the current trend of lower and lower cigarette deliveries, i.e., the smoker will be weaned away from the habit . . . . Nicotine is an important aspect of "satisfaction," and if the nicotine delivery is reduced below a threshold "satisfaction" level, then surely smokers will question more readily why they are indulging in an expensive habit.

240. A 1972 RJR memo echoed this concern:

> A tobacco products *[sic]* is, in essence, a vehicle for delivery of nicotine . . . . If, as proposed above, nicotine is the *sine qua non* of smoking, and if we meekly accept the allegations of our critics and move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business. If we intend to remain in business and our business is the manufacture and sale of dosage forms of nicotine, then at some point we must take a stand.
>
> . . .
>
> The cigarette industry is a highly ritualized and stylized segment of the pharmaceutical industry.
>
> . . .
>
> **Nicotine is a potent drug with a variety of psychological effects.**

(Emphasis supplied.)

241. The Tobacco Companies use a variety of means to manipulate and precisely control the levels and potency of nicotine in their products in order to assure continued addiction and to maintain their market in unsafe, addictive cigarettes.

242. Dr. David A. Kessler, former Commissioner of the Food and Drug Administration, recently testified to Congress that cigarette manufacturers can add nicotine to any part of the cigarette and can precisely manipulate the levels and delivery rate of the nicotine.

243. Kessler testified that "the cigarette industry has attempted to frame the debate on smoking as the right of each American to choose. The question we must ask is whether smokers really have that choice." Kessler stated:

a. "Accumulating evidence suggests that cigarette manufacturers may intend this result – that they may be controlling smokers' choice by controlling the levels of nicotine in their products in a manner that creates and sustains an addiction in the vast majority of smokers."

b. "We have information strongly suggesting that the amount of nicotine in a cigarette is there by design."

c. "The public thinks of cigarettes as simply blended tobacco rolled in paper. But they are much more than that. Some of today's cigarettes may, in fact, qualify as high technology nicotine delivery systems that deliver nicotine in precisely calculated quantities – quantities that are more than sufficient to create and to sustain addiction in the vast majority of individuals who smoke regularly."

d. "The history of the tobacco industry is a story of how a product that may at one time have been a simple agricultural commodity appears to have become a nicotine delivery system."

e. "[T]he cigarette industry has developed enormously sophisticated methods for manipulating nicotine levels in cigarettes."

f. "In many cigarettes today, the amount of nicotine present is a result of choice, not chance."

g. "[S]ince the technology apparently exists to reduce nicotine in cigarettes to insignificant levels, why, one is led to ask, does the industry keep nicotine in cigarettes at all?"

244. Dr. Kessler's testimony about nicotine manipulation has now been confirmed by industry documents. For example, a 1963 Brown & Williamson memo to BATCO states:

> I think we can say even now that we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require. Of this I am confident.

245. Dr. Kessler also testified that, as one example of this manipulation, Brown & Williamson had developed a tobacco plant, code named "Y-1," with perhaps twice the nicotine content of regular tobacco and had marketed cigarettes with Y-1 tobacco in the United States in 1993.

246. The Y-1 conspiracy was aided and abetted by DNA Plant Technology Corp. ("DNAP"), a biotechnology firm engaged in the development and improvement of various plant species and varieties through the use of advanced breeding and genetic engineering techniques.

In April 1985, Brown & Williamson contracted with DNAP to develop "commercial high-nicotine varieties" of tobacco. Brown & Williamson entered into this conspiracy to develop a reliable source of high-nicotine tobaccos that it could then use to control the nicotine levels in its cigarettes.

247. To hide the nicotine manipulation from the public and government regulators, Brown & Williamson had most of the Y-1 development work done in Brazil through its affiliate Souza Cruz Overseas. To conceal this conspiracy, Brown & Williamson instructed DNAP to tell FDA investigators that Y-1 had "never been commercialized." Only after the FDA discovered U.S. customs invoices indicating that 500,000 pounds of Y-1 nicotine-enriched tobacco had been shipped to Brown & Williamson did the company finally admit that it had developed a high-nicotine tobacco. DNAP recently pled guilty to the illegal export of Y–1 tobacco seed into Brazil in violation of U.S. law.

248. As another example, the Tobacco Companies also add chemicals to increase the alkalinity, or smoke pH, of tobacco blends and thereby increase nicotine potency and deliver an enhanced "nicotine kick."

249. In testimony given on January 29, 1998, in *State of Minnesota & Blue Cross & Blue Shield of Minnesota v. Philip Morris Inc.*, No. C1 94-8565 (Minn. Dist. Ct.), a civil action against the Tobacco Companies in St. Paul, Minnesota, Dr. Richard Kurt of the Mayo Clinic likened the effect of manipulating the alkalinity of cigarette smoke to freebasing nicotine.

250. As a further example, as stated above, the Tobacco Companies add several ammonia compounds during the manufacturing process that increase the

delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes.

251. An RJR memo noted:

> Philip Morris began using an ammoniated sheet material in 1965 and increased use of the sheet periodically from 1965 to 1974. This time period corresponds to the dramatic sales increase Philip Morris made from 1965 to 1974.

252. While Brown & Williamson publicly denied in 1995 that the use of ammonia in the processing of tobacco increases the amount of nicotine absorbed by the smoker, the company's own internal documents reveal that it and the other Tobacco Companies use ammonia compounds to increase nicotine delivery. A 1991 Brown & Williamson confidential blending manual states:

> Ammonia, when added to a tobacco blend, reacts with the indigenous nicotine salts and liberates free nicotine. . . . As the result of such change in the ratio of extractable nicotine to bound nicotine in the smoke may be altered in favor of extractable nicotine *[sic]*. As we know, extractable nicotine contributes to impact in cigarette smoke and this is how ammonia can act as an impact booster.

253. According to the Brown & Williamson manual, all American cigarette manufacturers except Liggett use ammonia technology in their cigarettes.

254. Patents owned by the Tobacco Companies also show that the cigarette industry has developed the capability to manipulate nicotine levels in cigarettes to an exacting degree. For example:

a. A Philip Morris patent application discusses an invention that "permits the release . . . in controlled

amounts and when desired, of nicotine in tobacco smoke."

b. Another Philip Morris patent application explains that the proposed invention is "particularly useful for the maintenance of the proper amount of nicotine in tobacco smoke" and notes that "previous efforts have been made to add nicotine to Tobacco Products when the nicotine level in the tobacco was undesirably low."

c. A 1991 RJR patent application states that "processed tobaccos can be manufactured under conditions suitable to provide products having various nicotine levels."

N. Defendants Continue To Fraudulently Conceal Their Manipulation of Nicotine.

255. Despite their statements that they accepted responsibility for health issues related to smoking and would discover and disclose all aspects of smoking and health, Defendants have fraudulently failed to reveal their manipulation of nicotine levels and potency.

256. The Tobacco Companies continue to deny to the public, and recently denied to Congress under oath, that they manipulate and control nicotine levels.

257. In April 1994, executives of Philip Morris, RJR, Lorillard, Liggett, and Brown & Williamson testified to Congress that the companies do not manipulate, add, control or restore nicotine during the manufacturing process or otherwise achieve a minimum level of nicotine in their products.

258. In April 1994, the Tobacco Companies placed advertisements across the country denying that they believe cigarette smoking is addictive and mislead-

ing the public about whether the cigarette manufacturers deliberately control nicotine levels in their products.

259. An advertisement placed by Philip Morris in newspapers across the country in April 1994 affirmatively represented that Philip Morris does not "manipulate" nicotine levels in its cigarettes and that "Philip Morris does not believe that cigarette smoking is addictive."

260. RJR placed a similar advertisement in newspapers across the United States in 1994 stating that "we do not increase the level of nicotine in any of our products in order to 'addict' smokers. Instead of increasing the nicotine levels in our products, we have in fact worked hard to decrease 'tar' and nicotine." RJR's advertisement then touted its use of "various techniques that help us reduce the 'tar' (and consequently the nicotine) yields of our products."

261. Further, as discussed above, American Tobacco misrepresented its manipulation of nicotine levels to the Waxman Subcommittee.

O. Defendants Targeted Children, the Poor, the Uneducated and Minorities.

262. The Tobacco Companies knew that nicotine was a highly addictive drug and that the cigarette delivery system for this drug caused cancer and other serious health problems, including death. The Tobacco Companies nevertheless sought to replace nicotine addicts who died, and they did so by marketing their products to children, knowing that a child who does not smoke by age 18 is unlikely to become a nicotine addict – and steady cigarette customer. Defendants also sought to increase the number of smokers by directly targeting members of racial minorities, both children and adults.

263. Despite the best efforts of parents, educators and the medical profession, tobacco use among young people has not declined and is now on the rise. Sophisticated propaganda and advertising techniques by the Tobacco Companies create a mental image associating tobacco use with healthy, glamourous and athletic lifestyles, success and sexual attractiveness. This is intended to get people to try cigarettes or other tobacco products. Within a short time, a new tobacco user becomes physiologically changed and addicted, as well as emotionally dependent. As the tobacco user begins to wish he or she could quit, the wrongful conduct of Defendants described herein reinforces the addiction and encourages the smoker to avoid the physical sickness, pain, and discomfort caused by depriving an addicted body of the nicotine it craves.

264. Smoking begins primarily during childhood and adolescence. Ninety percent of male smokers begin smoking before age 18. Each day more than 3,000 American teenagers start smoking. The Surgeon General summarized the problem in her 1994 report:

a. "Nearly all first use of tobacco occurs before high school graduation; this finding suggests that if adolescents can be kept tobacco-free, most will never start using tobacco."

b. "Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so."

c. "Cigarette advertising appears to increase young people's risk of smoking by affecting their perceptions of the pervasiveness, image, and function of smoking."

d. In 1990, cigarette advertising and promotional expenditures were almost $4 billion,

making cigarettes the second most promoted consumer product, after automobiles, in the United States.

e. The most notorious example of the targeting of minors is the Joe Camel advertising campaign conducted by RJR. When RJR began this cartoon campaign in 1988, Camel's share of the children's market was only 0.5%. In just a few years, Camel's share of this illegal market has increased to 32.8%, representing sales estimated at $476 million per year. Another indication of the phenomenal success of this marketing campaign is the fact that in a recent survey of six-year-olds, 91% of the children could correctly match Old Joe with a picture of a cigarette, and the silhouette of Mickey Mouse and the face of Old Joe were nearly equally well recognized by almost all children.

f. All Defendants are aware of the fact that smoking begins primarily among youths who are not yet 18 years of age.

265. In testimony before the Commerce Committee of the U.S. House of Representatives on January 29, 1998, Philip Morris CEO Geoffrey C. Bible and CEOs of the other Tobacco Companies testified that marketing to teens should be actively discouraged because of the health hazards of nicotine cigarettes. Nevertheless, for years, the Tobacco Companies did just the opposite.

266. Newly released "secret" documents demonstrate that the youth market has been systematically targeted by the Tobacco Companies to replace dying adults (who themselves first became addicted as children). Among other things, these documents constitute admissions of intentional and unlawful attempts to

induce children to purchase cigarettes all in violation of various state laws, which prohibit the sale of tobacco products to minors. These admissions demonstrate the Tobacco Companies' deliberate overall scheme to create, maintain, and replenish a pool of slowly dying consumers through fraud, misrepresentations, and deceptive acts by manipulating nicotine and manipulating the marketplace.

267. For example, in 1974, the Board of Directors of RJR was presented with a marketing plan that highlighted as an "opportunity area" a plan to "increase our young adult franchise," with "young adults" described as including children 14, 15, 16 and 17 years old, as well as people ages 18-24.

268. In 1980, the President of RJR received a report on that company's declining success in the market for sale of cigarettes to children ages 14-17. He was informed that "hopefully our various planned activities that will be implemented this fall will aid in some way in reducing or correcting these trends." That is, RJR hoped to sell even more cigarettes to children.

269. Similarly, in 1975, Brown & Williamson received an extensive report from its advertising agency with advice and analysis regarding the company's ability to attract "starters" (i.e., new smokers) in the age group 16-25.

270. The Tobacco Companies' manipulation of nicotine levels also served to create "starter" products that allowed children to become more hooked before migrating to adult brands. As one industry memo stated:

> (a) adolescents initiate smoking because of social factors – low-yield cigarettes may make it easier to start and thus encourage more "ex-

perimenters" to continue use until they graduate to the stronger brands.

(b) As low-yield brands become more popular among adults (given that they may) modeling behavior may lead adolescents to smoke them as well. Furthermore, such brands may become considered "safer" thus leading teenagers to pay less attention to public health campaigns designed to discourage initiation.

271. A disproportionate percentage of the poor, uneducated and minorities smoke cigarettes. These groups in turn represent a disproportionate share of those who receive unreimbursed health care services from the Public Hospital Districts. The Tobacco industry spends tens of millions of dollars each year in advertising, marketing and promotion targeted to these groups.

272. According to the Department of Health and Human Services, 40% of black men smoked in 1989 compared to 32% of white males. Black women also smoked more than white women.

273. A Philip Morris document notes that "[l]ower income groups tend to smoke in significantly higher proportions than the more affluent."

274. According to the 1998 Surgeon General's Report, persons with low income, "regardless of race or ethnicity, are more likely to be uninsured . . . [and] to rely on hospital clinics and emergency rooms for health services."

275. The 1998 Surgeon General's Report and other published sources indicate that the Tobacco Industry targeted advertising and promotion of tobacco products among minorities and lower income groups.

P. Defendants Fraudulently Concealed Their Misconduct.

276. Until recently, the Public Hospital Districts did not know of Defendants' misconduct as described in this complaint or of facts from which that misconduct might reasonably have been inferred or that would have led to its discovery. The Public Hospital Districts could not have discovered these facts or the alleged violations at an earlier time because Defendants fraudulently concealed their course of conduct and suspended the results of their internal research, which was exclusively within Defendants' control.

277. The Public Hospital Districts are not fully aware of the methods Defendants used to conceal their activities, but believe that those methods, used by Defendants to further their combination and conspiracy, were by nature self-concealing and not of a type that could reasonably have been apparent to Plaintiffs.

278. One method of concealment was to bury relevant documents. In 1985, a Brown & Williamson attorney recommended that much of its medical research be declared "deadwood" and shipped to England. The attorney stated, "I had marked certain of the document references with an X. The X designated documents which I suggested were deadwood in the behavioral and biological studies area. I said that the 'B' series are Janus series studies and should also be considered as deadwood." The attorney further suggested that the research, development and engineering department also "should undertake to remove the deadwood from its files."

279. Brown & Williamson attempted to control other documents that its attorneys thought might

later cause difficulties in product liability actions so that it could falsely claim an attorney-client privilege or work-product protection for those documents. Such documents included scientific reports that the company sought to protect from discovery:

> [Scientific] material should come to you [corporate counsel] under a policy statement between you and Southampton [BATCO] which describes the purpose of developing the documents for B&W and sending them to you as use for defense of potential litigation. It is possible that a system can be devised which would exempt the Engineering reports because it might be difficult to maintain a privilege for covering such reports under the potential litigation theory. Continued Law Department control is essential for the best argument for privilege. At the same time, control should be exercised with flexibility to allow access of the R&D staff to the documents.

280. Other Defendants have used similar tactics to conceal the activities of the conspiracy. The joint actions of the conspiracy through CTR and the Tobacco Institute have been similarly shielded from scrutiny. Part of the document review undertaken by Brown & Williamson was an effort to conceal documents showing the true nature of the associations: "[In conducting document review,] pay special attention to documents suggesting that [Tobacco Institute] was used as a vehicle for the for the industry's alleged conspiracy to promote cigarettes through the 'open controversy' PR program."

281. CTR had a number of research project categories. Of particular significance is the category "special projects." Special projects were reviewed and selected for funding by the general counsel of the

member companies. It may be reasonably inferred that lawyers controlled this research in an attempt to protect it from discovery and to further the conspiracy.

282. CTR's manipulation of research is shown in Committee of General Counsel minutes transmitted via a September 18, 1981 letter from an outside law firm, which stated: "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR Special Project. If he did not like it, then it became a lawyers' special project." These minutes explicitly acknowledge that the supposedly "independent" scientific director of CTR channeled research into "special projects" for Defendants' litigation efforts and concealment.

283. In *State of Florida v. American Tobacco Co.*, No. CL 95-1466 (15th Judicial Cir.), a civil action brought by the Florida State Attorney General against the Tobacco Companies, Special Master R. William Rutter Jr. ruled on April 9, 1997, that there was sufficient evidence to demonstrate fraud on the part of the Defendants:

> [T]here is sufficient evidence which, if believed by the trier of fact, would be sufficient to support Plaintiffs' theory of fraud. Plaintiffs' theory . . . substantially relates to allegations that the Defendants engaged in extensive efforts to hide from and misrepresent to the public, the health hazards associated with cigarettes and that Defendants misled and defrauded the public and public health officials regarding the relationship between smoking and health. There is also evidence that the Defendants utilized attorneys in carrying out and planning fraudulent activities

and undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking.

284. As recently as December 30, 1997, the trial court in *State of Minnesota v. Philip Morris, Inc.*, No. Cl-94-8565, sanctioned Brown & Williamson $100,000 for willfully violating a court order to produce documents and required disclosure of documents Brown & Williamson had claimed were subject to the attorney-client privilege. The court ruled that Brown & Williamson had "blatantly disobeyed an Order of the Court" and "challenged the authority of the judicial system and impugned the integrity of that system."

285. Defendants' fraudulent concealment, conspiracy, and illegal conduct continues to the present and, unless enjoined, will continue in the future. For example, the Tobacco Companies continue to assert unfounded claims of privilege, to make bogus claims of confidentiality, and to misuse protective orders in litigated cases.

286. Even today, Defendants equivocate when asked under oath about the addictive nature of nicotine. For example, in 1994, each of the CEOs of the Tobacco Companies testified under oath before Congress that smoking was not addictive. One industry representative testified: "I don't agree [that nicotine is addictive]. From what I've read on nicotine is *[sic]* that it contributes to the flavor, the taste of the product." Others testified as follows:

a. Andrew Tisch of Lorillard asserted that smoking does not cause cancer:

> We have looked at the data and the data that we have been able to see has all been statis-

trical data that has not convinced me that smoking causes death.

b. William L. Campbell of Philip Morris asserted that "Philip Morris doesn't manipulate nor independently control the level of nicotine in our products"; "Cigarette smoking is not addictive"; and "Philip Morris research does not establish that smoking is addictive."

c. James W. Johnston of RJR said that "smoking is no more addictive than coffee, tea or Twinkies."

287. Philip Morris continues to compare cigarettes to candy and sweets. In April 1997, James Morgan, President of the U.S. Tobacco division of Philip Morris, stated in a sworn deposition that cigarettes are not pharmacologically addictive, but are only "behaviorally addictive or habit-forming," just like "Gummy Bears" candy.

Q. The Tobacco Industry Must Be Held Accountable.

288. Despite the egregiousness of their conduct and the toll – human and economic –wreaked by the Tobacco Companies and their trade associations, the Tobacco Companies have so far enjoyed virtual immunity from liability because of their scorched-earth tactics in defending lawsuits and their successful conspiracy to conceal truthful information about the adverse health effects of tobacco and nicotine, including addiction.

289. The Tobacco Companies have reveled in their ability to reap enormous profits at the expense of their addicted nicotine users. One BATCO memorandum summarized the industry's greed, driven by their callousness toward smokers addicted to nicotine in cigarettes:

> **Summary:** So – give them what they seem to want, taste and value. And always remember that, while King James I issued his famous "Counter-

> blaste to Tobacco," in 1604, it is nicer from our point of view to remember Oscar Wilde's words in the "The Picture of Dorian Gray" in 1891: "A cigarette is the perfect type of a perfect pleasure. It is exquisite, and it leaves one unsatisfied. What more can one want." Let us provide the exquisiteness, and hope that they, our customers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to bank.

290. In large part, the success of the Tobacco Companies has been founded on the industry's heretofore sanctioned litigation tactics. As one Tobacco Company lawyer wrote in 1988:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for Plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynold's *[sic]* money, but by making that other son of a bitch spend all his.

291. The Tobacco Companies' immunity is also attributable to its success in fraudulently suppressing harmful information about nicotine and tobacco.

292. The Public Hospital Districts have expended and will continue to expend substantial sums of money to provide unreimbursed health care services to patients for treatment of tobacco and nicotine-caused diseases, such as cardiovascular diseases, cancer, emphysema and addiction. The total cost for these Public Hospital Districts will be proven at trial, but is estimated to be millions of dollars per year.

R. New Evidence of Wrongful Conduct Is Emerging.

293. Defendants have used invalid claims of privilege to shield from public view and to withhold from adversaries in litigation tens of thousands of documents that bear directly on their wrongful conduct over the decades.

294. Improperly concealing documents and other evidence by improper claims of attorney-client privilege and other means has been a central aspect of Defendants' conspiracy. Among the evidence that Defendants long sought to keep hidden is a certain group of approximately 39,000 documents that the Tobacco Companies claimed were privileged. The Tobacco Companies' improper claims of privilege were rejected primarily under the crime-fraud exception to the privilege. In April 1998, the Tobacco Companies were ordered to turn these documents over to Congress and to plaintiffs in the Minnesota case, despite efforts by the Tobacco Companies in that case to stonewall production of the documents and, as part of their scorched-earth tactics, to delay production through a frivolous appeal to the U.S. Supreme Court.

295. On April 22, 1998, most of these 39,000 documents were made available for public scrutiny on the internet, and they include evidence of massive and continuing wrongdoing by the Tobacco Companies.

296. For example, these documents demonstrate that the Tobacco Companies manipulated and suppressed research results and that Defendants had in place written instructions to destroy research results they considered harmful.

297. In one RJR document, an RJR official wrote to a company attorney: "We do not foresee any diffi-

culty in the event a decision is reached to remove certain reports from research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files."

298. On October 14, 1998, Bennett LeBow, chairman and chief executive officer of the holding company that owns Defendants Liggett Group, Inc., and Liggett & Myers, Inc., testified in the trial of the State of Washington's case against the Tobacco Companies in Seattle, Washington. During his revealing testimony, LeBow stated that he "smelled a rat" when codefendant Philip Morris, offered to pay Liggett's legal fees for defending against tobacco lawsuits. Based on this and other information, LeBow stated his belief that the Tobacco Industry has deliberately misled the public and that in spite of its statements to the contrary, has long been aware that nicotine is a powerfully addictive drug and that the cigarettes that deliver that drug cause cancer.

299. On November 10, 1998, attorney Lawrence Meyer, outside counsel for Liggett from 1974 to 1986, also testified in the trial of the State of Washington's case against the Tobacco Companies in Seattle, Washington. Meyer testified about Liggett's efforts to create a safer cigarette. Known as the Epic, this cigarette was produced under Liggett's efforts to create a safer cigarette. Known as the Epic, this cigarette was produced under Liggett's "XA Project" conducted in the late 1970s.

300. Liggett's researchers believed they had a winner because the Epic reduced the production of cancerous tumors by up to 100%. In spite of this startling innovation and Liggett's belief that "major health benefits [could] be predicted" from the manufacture and sale

of these cigarettes, Meyer testified, the Epic cigarette was never marketed. Other tobacco companies feared that the sale of a "safer" cigarette would be an admission that their products were inherently dangerous. They threatened to leave Liggett out of joint legal defenses against lawsuits if it produced the Epic cigarette. Through their collusive efforts, the Tobacco Companies ensured that a product shown to effectively reduce the incidence of tumors and other side effects from smoking never reached the public.

301. This and other recently discovered evidence reveal ongoing deception of the public; targeting of minors, lower income groups and minorities; manipulation of toxic additives, and a host of other wrongful conduct, the full scope of which is not yet known.

V. CLAIMS FOR RELIEF

COUNT 1

VIOLATION OF THE SHERMAN ACT (15 U.S.C. §1)

[Against All Defendants]

302. Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

303. Since the early 1950s, and continuing to the present, the Defendant Tobacco Companies, aided and abetted by the other Defendants herein, have violated Section 1 of the Sherman Act, 15 U.S.C. §1, by entering into, adhering to, and continuing to observe the terms of a combination or conspiracy in unreasonable restraint of trade and commerce in the market for cigarettes and other nicotine/tobacco products in the United States. Such illegal concerted action has eliminated com-

mercial competition that would have existed but for the conspiracy. Specifically, Defendants have conspired (a) to suppress innovation and competition in product quality by agreeing not to engage in research, development, manufacture and marketing of less harmful cigarettes and other tobacco products; (b) to suppress output in a market and to engage in concerted refusal to deal, by agreeing to restrict the output of less harmful cigarettes and other nicotine products; and (c) to suppress competition in marketing, by agreeing not to take business from one another by making claims about the relative safety of particular brands, whether or not such claims would have been truthful. But for the conspiracy, competition in the market for cigarettes in the United States would have been far more vigorous and consumers and others would have reaped enormous benefits.

304. But for the conspiracy, one or more of the Tobacco Companies would have developed a commercially successful, less harmful cigarette; such a cigarette would have garnered a substantial share of the market for cigarettes and other nicotine/tobacco products; and those who used that product rather than conventional cigarettes would have had significantly fewer health problems. As a result, the Public Hospital Districts would have incurred substantially lower costs in providing unreimbursed health care services.

305. A relevant market in which Defendants' violations occurred is the manufacture and sale of cigarettes and other nicotine products in the United States. Because, among other things, such products are physically addictive, they are not reasonably interchangeable with other consumer products, nor are they characterized by cross-elasticity of price with other consumer products.

There would have existed, but for Defendants' conspiracy, the manufacture and sale in the United States of less harmful cigarettes and other products that would still have delivered nicotine but would have had materially less deleterious health effects than the products actually manufactured and sold by Defendants. Such products would have proven attractive to many smokers, who would have chosen to buy them had they been available.

306. Because Defendants have conspired to suppress output of less harmful cigarettes and other nicotine products and to refuse to deal in such products, their conduct is unreasonable per se under Section 1 of the Sherman Act. There is, moreover, no colorable justification for the concerted action alleged herein does not relate to any lawful business transaction, does not promote efficiency, does not advance the interests of consumers, and does not promote interbrand or intrabrand competition.

307. Antitrust law protects competition in innovation and product quality, just as it protects price competition. Defendants willfully violated antitrust law by agreeing to suppress competition related to the safety of their products. It was clearly foreseeable that this antitrust violation would injure smokers' health, and it was just as foreseeable that the violation would, at the same time, cause those financially responsible for smokers' health care to suffer an injury in their business or property by paying increased costs and expenses for health care services and products. These two kinds of injury are inextricably intertwined. Each flows directly from the anticompetitive effects of the illegal conduct. The harm suffered by the Public Hospital Districts is the precise type of harm that a conspiracy to suppress com-

petition related to product safety would be likely to cause. Accordingly, this harm reflects the anticompetitive effects of the violation.

308. The Public Hospital Districts are the efficient and natural parties to redress this antitrust violation and deter future violations and unlawful conduct by the Defendants. Moreover, the interests of the Public Hospital Districts are aligned with those of consumers and with the public interest in increased competition and vigorous antitrust enforcement.

309. The damages claimed by the Public Hospital Districts are the costs of providing unreimbursed tobacco-related health care services. The damages sought in this action, therefore, do not duplicate damages that are asserted, or could be asserted, by any other persons who have been injured by Defendants' unlawful conduct. Accordingly, awarding damages to the Public Hospital Districts will not risk duplicative recovery, nor will determining the amount of such damages require apportionment of damages as between the Public Hospital Districts and others. Moreover, because others cannot sue to recover these damages, allowing the Tobacco Companies to avoid the consequences of their illegal conduct would risk letting a major antitrust violation go unremedied.

310. As a direct and proximate result of the combination or conspiracy, the Public Hospital Districts were injured in their business and property by reason of Defendants' conspiracy in the market for cigarettes and other nicotine/tobacco products, including the suppression of a relevant submarket for safer cigarettes and other nicotine delivery devices that would have existed but for Defendants' unlawful conduct.

311. Under 15 U.S.C. §15, the Public Hospital Districts are entitled to recover three times the actual damages they have sustained, and will in the future sustain, by reason of Defendants' violation of the Sherman Act, together with the costs of bringing this action and reasonable attorney fees. Such damages run into the tens of millions of dollars.

312. Under 15 U.S.C. §26, the AWPHD and the Public Hospital Districts are also entitled to injunctive relief requiring Defendants to cease and desist from conspiring to suppress the research, development and marketing of safer cigarettes and directing Defendants to take such further steps as the Court may deem necessary and appropriate to reverse the anticompetitive effects of Defendants' conspiracy.

COUNT 2

VIOLATION OF THE SHERMAN ACT
(15 U.S.C. §1)

[Against All Defendants]

313. The Plaintiffs restate and incorporate herein paragraphs 1 through 312 of this complaint.

314. The Tobacco Company Defendants are, among other things, in the business of selling nicotine, an addictive substance that is a drug, both commercially and within the meaning of 61 Fed. Reg. 44,396, 44,397 (1996), as recognized by the medical profession and by the United States Food and Drug Administration. Cigarettes are a combination product under 61 Fed. Reg. 44,396, 44,397 (1996), consisting of the drug nicotine and medical device components that deliver nicotine to the body. Accordingly, the Tobacco Company

Defendants participate as sellers in the broad U.S. market for drugs.

315. But for the conspiracy alleged herein, a new relevant submarket for less harmful cigarettes and other nicotine products would have become available to consumers. Such products would likewise have been drugs and, as such, would have formed part of the broad market for drugs.

316. The Public Hospital Districts are purchasers in the market for drugs, including nicotine delivery products, and they incur unreimbursed costs for the benefit of their patients.

317. The Public Hospital Districts are purchasers of drugs, products and services used to treat nicotine addiction and dependence. The Public Hospital Districts are potential purchasers for less harmful cigarettes or other nicotine products, a market in which the Tobacco Companies conspired to suppress competition.

318. Had one been available, a less harmful cigarette or other nicotine delivery device would have been a useful and necessary product for health care providers' treatment of persons suffering nicotine dependence and addiction. Had such a product been available, the Public Hospital Districts would have had the opportunity to purchase it for use in the treatment of persons suffering from nicotine addiction.

319. As a direct and proximate result of the combination or conspiracy, the Public Hospital Districts were injured in their business or property as a purchaser in the broad market for drugs and as a potential purchaser for safer cigarettes or other nicotine products.

320. Under 15 U.S.C. §15, the Public Hospital Districts are entitled to recover three times the actual damages they have sustained, and will in the future sustain, by reason of Defendants' violation of the Sherman Act, together with the costs of bringing this action and reasonable attorney fees. Such damages run into the tens of millions of dollars.

321. Under 15 U.S.C. §26, the AWPHD and the Public Hospital Districts are also entitled to injunctive relief requiring Defendants to cease and desist from conspiring to suppress the research, development and marketing of safer cigarettes and directing Defendants to take such further steps as the Court may deem necessary and apporpriate to reverse the anticompetitive effects of Defendants' conspiracy.

COUNT 3

VIOLATION OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

(18 U.S.C. § §1962 (c) and 1962 (d))

[Against All Defendants except the Council for Tobacco Research, the Tobacco Institute, and the Smokeless Tobacco Council, Inc.]

322. Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

323. This claim for relief is asserted against each of the Defendants except the Tobacco Institute, STC and CTR and arises under 18 U.S.C. §1962(c) and (d) of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), which provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

324. At all relevant times, each Defendant was a "person" within the meaning of 18 U.S.C. § 1061(3) because each Defendant was "capable of holding a legal or beneficial interest in property."

325. At all relevant times, the Tobacco Institute, CTR (formerly TIRC) and STC each constituted an "enterprise" within the meaning of 18 U.S.C. §1961($) and have together constituted an "enterprise" (collectively, the "Public Relations Enterprise") within the meaning of 18 U.S.C. §1961(4). Each enterprise, including the Public Relations Enterprise, is an ongoing organization that has an ascertainable structure and purpose beyond the scope of Defendants' predicate acts and their conspiracy to commit those acts.

326. Each enterprise, including the Public Relations Enterprise, is an ongoing organization whose constituent elements function as a continuing unit in maximizing the sales of tobacco products, misleading the public and regulators about the health hazards of tobacco products, suppressing the truth concerning the addictive properties of nicotine and of the Tobacco Companies' manipulation of nicotine levels, and carrying out other elements of Defendants' scheme, including the Public

Hospital Districts. Each enterprise, including the Public Relations Enterprise, has an ascertainable structure and purpose beyond the scope of Defendants' predicate acts and their conspiracy to commit such acts. Each enterprise, including the Public Relations Enterprise, has engaged in, and its activities have affected, interstate and foreign commerce.

327. Such enterprises, including the Public Relations Enterprise, were born at an industry strategy meeting on December 15, 1953, at the Plaza Hotel in New York. The participants included representatives of American Tobacco, RJR, Philip Morris, Lorillard, Brown & Williamson, U.S. Tobacco, and Hill and Knowlton. As alleged above, the participants agreed to form an organization to orchestrate a public relations campaign to protect their cigarette market from the perceived threat posed by adverse medical reports. This committee was designed to promote an offensive, pro-cigarette stance to counter reports of health dangers caused by cigarettes. The public misinformation campaign continued over the next four decades and threatens to continue into the future.

328. Each of the Defendant Tobacco Companies has been associated with each of these enterprises. Each of the Defendant Tobacco Companies helped to direct each enterprise's actions and manage its affairs. Each of the Defendant Tobacco Companies conducted or participated, directly or indirectly, in the conduct of each enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c). Defendants' pattern of racketeering activity dates from at least 1953, continues to the present, and threatens to continue into the future. Defendants' multiple predicate acts of racketeering, as alleged above, include the following:

a. Mail and wire fraud, in violation of 18 U.S.C. §§1341 and 1343. Defendants engaged in schemes to defraud members of the public, including the Public Hospital Districts, regarding the health consequences associated with using nicotine tobacco products. Those schemes have involved suppression of information regarding the health consequences associated with smoking, as well as fraudulent misrepresentations and omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Defendants' misrepresentations and fraudulent concealment of material facts, direcly or by implication, include but are not limited to the following: misrepresentations and fraudulent concealment of the addictive nature of nicotine and the adverse health consequences of tobacco products; misrepresentations that such health effects of addictiveness were unknown or unproven; misrepresentations about Defendants' ability to manipulate and about the manipulation of nicotine levels and the addictive qualities of cigarettes; misrepresentations that they would provide the public and governmental authorities with objective, scientific information regarding all phases of smoking and health; and fraudulent concealment of certain aspects of smoking and health, including the availability of safer cigarettes and less addictive cigarettes. Defendants executed or attempted to execute such schemes through the use of the U.S. mails and through transmissions by wire, radio and television communications in interstate commerce.

(1) Numerous documents were disseminated or transmitted by Defendants and their agents as part of a fraudulent scheme to mislead the public and others about the risks to health and life associated with smoking cigarettes. On information and belief, Defendants used

the mails and wires to disseminate and transfer information in at least the following ways:

(a) Defendants' marketing and promotional activities and testimony communicated to the public nationwide in newspapers, magazines and other periodicals, as well as communications and testimony sent over broadcast media, were designed to deceive the public, including the Public Hospital Districts, regarding, among other things, the addictive nature of smoking and of smokeless tobacco, the adverse health effects associated with tobacco use and the objectivity and accuracy of Defendants' "independent" research efforts regarding those health effects. Examples of these marketing and promotional activities are described above;

(b) Defendants' communications directed toward government agencies and health officials were designed to preserve and increase the market for nicotine tobacco products while concealing the deleterious health effects caused by those products. Examples of these communications with government agencies include Defendants' communications with the U.S. Surgeon General, as well as their communications with Congress;

(c) Defendants communicated with each other regarding research into the effects of nicotine and ways to suppress that information; and

(d) Defendants communicated with each other and the public regarding ways to identify and target the minors' market for the sale of cigarettes.

(2) Chief Executive Officers or other representatives of Defendants made false and fraudulent statements under penalty of perjury in hearings before

the House Subcommittee on Health and the Environment, convened on March 25, April 14, April 28, May 17, May 26, June 21 and June 23, 1994, and televised nationwide. Defendants' press releases also recounted Defendants' fraudulent statements. The witnesses affirmatively denied that Defendants manipulate the amount of nicotine contained in cigarettes, denied that using tobacco products causes cancer, and denied that there was any correlation between the amount of nicotine in nicotine tobacco products and the incidence of cancer.

(3) On the nationally televised CBS program *Face the Nation*, air date March 27, 1994, Brenda Dawson, vice president of the Tobacco Institute, stated before a live television and radio audience: "[A]ll six cigarette manufacturers in the United States do . . . not add nicotine" and "they don't manipulate nicotine. So Congress has been told form[ally] by every cigarette manufacturer in the United States that this claim is without foundation."

(4) Obstruction of justice in the form of threatening and intimidating a witness, in violation of 18 U.S.C. §1512, and threatening to retaliate against a witness, in violation of 18 U.S.C. §1513. Upon information and belief, Defendants have made threats against Jeffrey Wigand, former research chief of Brown & Williamson, to discourage him from providing testimony in connection with *Mike Moore, Attorney General, ex rel. State of Mississippi v. American Tobacco Co.*, No. 94-1429 (Ch. Ct. Jackson Co. Miss.), and in other litigation against the Tobacco Companies and to retaliate against him for having served as a witness.

b. Engaging in interstate or foreign travel in aid of racketeering activities, in violation of 18 U.S.C. §1952.

c. Engaging in myriad efforts to sell cigarettes and other tobacco products to minors in violation of various state laws.

d. Chief Executive Officers or other representatives of Defendants made false and fraudulent statements under penalty of perjury in hearings before the House Subcommittee on Health and the Environment, convened on March 25, April 14, May 17, May 26, June 21, and June 23, 1994.

329. These predicate acts form a "pattern" of racketeering activity. They have been related in their common objectives of maximizing sales of tobacco products; misleading Congress, the public government regulators and health care providers, including the Public Hospital Districts, about the hazards of tobacco use and the addictive properties of nicotine; suppressing the truth concerning the addictive properties of nicotine and Defendants' manipulation of nicotine levels; soliciting minors and others to purchase cigarettes through false and misleading advertising, directing marketing and advertising toward minorities, teenagers and children so as to addict more cigarette buyers at an early age and otherwise devising means for manipulating and controlling nicotine levels of tobacco so as to addict minors and others; suppressing research and design and marketing of safer or less addictive cigarettes or alternative nicotine delivery products; and avoiding responsibility for the foreseeable costs of medical care for tobacco-related diseases that are now imposed on health care providers such as the Public Hospital Districts. These acts have had the same or similar purposes, results, participants, victims and

methods of commission. The acts have been consistently repeated, are capable of further repetition and are being repeated.

330. Each Defendant conspired also to violate 18 U.S.C. §1962(c), in violation of 18 U.S.C. §1962(d). As detailed above, the conspiracy began in 1953, continues to the present, and threatens to continue into the future. The object of the conspiracy was and is to protect the Tobacco Companies' business operations by conducting the affairs of the enterprise through a pattern of racketeering. Each Tobacco Company Defendant agreed to join the conspiracy, agreed to conduct the enterprise through a pattern of racketeering, and agreed to the commission of and knowingly participated in at least two predicate acts within 10 years of each other. Each Tobacco Company Defendant knew that those predicate acts were part of racketeering activity that would further the conspiracy.

331. The reason Defendants' violations of 18 U.S.C. §§1962(c) and (d) have proximately caused direct injury to the business and property of the Public Hospital Districts is that the Public Hospital Districts have been required to bear significant, ascertainable, unreimbursed costs and expenses attributable to tobacco-related diseases. The Public Hospital Districts have also been unable to participate in a health care market in which there would have been alternative safer or less addictive cigarettes that would have reduced costs and expenses related to tobacco-related diseases or to advise or suggest to their patients that they choose to use effective alternative products such as safer cigarettes or less addictive cigarettes or other nicotine delivery devices. The Public Hospital Districts were unable to reduce the costs of

tobacco-related diseases suffered by their patients because the Public Hospital Districts detrimentally relied on the false and fraudulent statements and informatin disseminated through an enterprise conducted by Defendants through a pattern of racketeering activity. Had Defendants not violated 18 U.S.C. §§1962(c) and (3), these costs and expenses would have been substantially reduced.

332. This injury does not take the form of personal injuries suffered by smokers, and it is not a derivative injury of the harm caused to smokers. It is a separate economic injury directly to the business and property of the Public Hospital Districts, which injury was intended by Defendants and is wholly distinct from the harms suffered by individuals. The Public Hospital Districts suffered economic injury from Defendants' violations of 18 U.S.C. §§1962(c) and (d) because the Public Hospital Districts have been obligated by law (not by contract) to bear the resulting costs of unreimbursed health care services to their patients out of the Public Hospital Districts' own assets. No other person has standing to bring an action for the recovery of damages for this direct injury suffered by the Public Hospital District as a result of Defendants' conduct.

333. The consumption of tobacco products by the patients of the Public Hospital Districts, and by consumers throughout the United States, was the very object of Defendants' wrongful conduct, and those products were used by the Public Hospital Districts' patients precisely as Defendants intended. The injury thus inflicted on the Public Hospital Districts by Defendants was both foreseeable and intended, with the negative health effects Defendants knew were inevitable.

334. Another object of Defendants' wrongful conduct was the knowing and intentional avoidance and shifting of tobacco-related, unreimbursed health care costs, including the costs of diagnosis and treatment, onto others, including the Public Hospital Districts. Defendants knew that the development of illness and disease was an inevitable result of the use of their tobacco. Defendants also knew and intended that governmental entities charged with protecting community health, including the Public Hospital Districts, would incur substantial financial injury as a result of their conduct.

335. Under the provisions of 18 U.S.C. §1964(c), the Public Hospital Districts are entitled to bring this action and to recover treble damages, the costs of bringing this action, and reasonable attorney fees.

COUNT 4

VIOLATION OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (18 U.S.C. §§1962(a) and (d))

[Against All Defendants]

336. Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

337. This claim for relief is asserted against each Defendant and arises under 18 U.S.C. §§1962(a) and (d) of RICO, which provide:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or

> operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a) . . . of this section.

338. At all relevant times, each Defendant was a "person" within the meaning of 18 U.S.C. §1961(3), as each Defendant was "capable of holding a legal or beneficial interest in property."

339. At all relevant times, the Tobacco Institute, CTR (formerly TIRC) and STC have constituted an enterprise within the meaning of 18 U.S.C. §1961(4) or, in the alternative, each Defendant has constituted an enterprise within the meaning of 18 U.S.C. §1961(4). Each enterprise is an ongoing organization. Each enterprise and its activities affect interstate commerce in that the enterprise is engaged in the business of maximizing the sales of cigarettes and other nicotine products.

340. As alleged above, Defendants have engaged in a pattern of racketeering activity that dates from 1953 to the present and threatens to continue into the fugure. These racketeering acts generated income for Defendants because they contributed to the suppression and concealment of scientific and medical information regarding the health effects of tobacco products; the suppression of a market for alternative safer or less addictive nicotine products; the targeting of teenagers and children and minorities with marketing and advertising designed to addict them, all to protect and ensure continued sales of Defendants' unsafe and addictive tobacco products; and the avoidance and shifting of smoking-related health care costs to others, including the Public Hospital Districts, by

the methods stated above, including illicit litigation tactics such as unfounded claims of attorney-client privilege.

341. Defendants have used or invested their illicit proceeds, generated through the pattern of racketeering activity, directly or indirectly in the acquisition of an interest in, or in the establishment or operation of, each enterprise, in violation of 18 U.S.C. §1962(a). Defendants' use and investment of these illicit proceeds in each enterprise is for the specific purpose and has the effect of controlling the material information distributed to the public concerning the health effects of smoking; supressing and concealing scientific and medical information regarding the adverse health effects of smoking and the alternatives of safer or less addictive cigarettes; devising means for manipulating nicotine to create and sustain addiction to Defendants' products; directing marketing and advertising toward minorities, teenagers and children to addict them; and enticing more individuals to smoke or to use Defendants' unsafe nicotine tobacco products.

342. Each Defendant also conspired to violate 18 U.S.C. §1962(a), in violation of 18 U.S.C. §1962(d). As detailed above, the conspiracy began in 1953, continues to the present, and threatens to continue into the future. The object of the conspiracy was and is to protect the Tobacco Companies' business operations by investing their illicit proceeds, generated through a pattern of racketeering activity, in each enterprise. Each Defendant agreed to join the conspiracy, agreed to invest racketeering-generated proceeds in each enterprise in order to continue enterprise operations, and agreed to the commission of and knowingly participated in at least two predicate acts within 10 years of each other. Each Defen-

dant knew that those predicate acts were part of racketeering activity that would further the conspiracy.

343. Defendants' violations of 18 U.S.C. §§1962(a) and (d) have proximately caused direct injury to the business and property of the Public Hospital Districts because the Public Hospital Districts have been required to incur significant unreimbursed costs and expenses attributable to tobacco-related diseases; have been unable to participate in a market for alternative less harmful or less addictive nicotine products or to advise or suggest to their patients that they use alternative products such as safer or less addictive tobacco products or other nicotine delivery devices; and have not been as effective as they would otherwise have been in helping their patients avoid the use of hazardous nicotine/tobacco products. In absence of Defendants' violation of 18 U.S.C. §§1962(a) and (d), these unreimbursed costs and expenses would have been substantially reduced.

344. This injury is not a form of compensation for personal injuries suffered by smokers and it is not a derivative injury of the harm caused to smokers. It is a separate and direct economic injury to the business and property of the Public Hospital Districts and is wholly distinct from the harms suffered by individuals. The Public Hospital Districts have suffered this same economic injury from Defendants' violations of 18 U.S.C. §§ 1962(a) and (d) because the Public Hospital Districts have been obligated by law (not by contract) to bear the resulting costs of unreimbursed health care services. No other person has standing to bring an action for the recovery of damages for this direct injury caused by Defendants' actions. The consumption of tobacco products by the patients of the Public Hospital Districts and

by consumers throughout the United States was the very object of Defendants' wrongful conduct, and those products were used by the Public Hospital Districts' patients precisely as Defendants intended, with the negative health effects Defendants knew were inevitable. The injury thus inflicted on the Public Hospital Districts by Defendants was both foreseeable and intended.

345. Another object of Defendants' wrongful conduct was the knowing and intentional avoidance and shifting of tobacco-related, unreimbursed health care costs, including the costs of diagnosis and treatment, onto others, including the Public Hospital Districts. Defendants knew that the development of illness and disease was an inevitable result of the use of their tobacco. Defendants also knew that governmental entities charged with protecting community health, including the Public Hospital Districts, would incur substantial financial injury as a result of their conduct.

346. The Public Hospital Districts have been directly injured in their business and property by reason of Defendants' violations of 18 U.S.C. §§1962(a) and (d) in that they have been required to incur significant unreimbursed costs and expenses attributable to tobacco-related illnesses and diseases. Under the provisions of 18 U.S.C. §1964(c), the Public Hospital Districts are entitled to bring this action and to recover three times the amount of damages sustained, the costs of bringing this action, and reasonable attorney fees.

347. Defendants' unlawful conduct will continue unless the relief prayed for in this complaint is granted.

COUNT 5

FRAUDULENT MISREPRESENTATION

[Against All Defendants]

348. Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

349. Defendants represented and promised to those who advance and protect the public health and provide health care and health care services that they would discover and disclose all material facts about the effects of cigarette smoking and other tobacco product use on human health, including addiction.

350. Defendants have made and continue to make representations, statements and promises about the safety of cigarettes, other tobacco products, and nicotine in general and their effect on human health and addiction. Such representations, statements and promises were at the time Defendants made them, and remain, materially false, incomplete and fraudulent, and Defendants knew or had and continue to have reason to know of their falsity. Only Defendant Liggett has conceded that the nicotine in cigarettes is addictive; Liggett made this admission for the first time in March 1997.

351. In testimony before Congress in January 1998, executives of other Tobacco Companies tried to have it both ways concerning the question of addiction. They stated that they personally did not think nicotine was addictive, but conceded that under some definitions, it would be considered addictive.

352. In view of the documentary record establishing that the Tobacco Companies have known for years with certainty that nicotine is addictive, such testimony is dishonest and part of an ongoing attempt to disseminate false and misleading information.

353. At all relevant times Defendants intentionally, willfully or recklessly misrepresented material facts about the human health hazards of tobacco use, including addiction, and the association of cigarette smoking and other tobacco product use with various diseases of the heart, lung and other vital organs.

354. Because of Defendants' secret internal research, Defendants' knowledge of the material facts about tobacco use, health and addiction was and is superior to that of the Public Hospital Districts, which undertook to provide unreimbursed health care for their patients. In addition, Defendants' knowledge of the material facts about tobacco use, health and addiction was and is superior to the knowledge of the Public Hospital Districts' patients who purchased, used and consumed the Tobacco Companies' cigarettes and other nicotine tobacco products. At all relevant times, public access to these facts has been limited because such facts have been exclusively within Defendants' control.

355. By expressly raising the issue of smoking, health and addiction and making partial and incomplete statements to the public about these issues, Defendants had a duty to reveal all material facts of which they had notice or actual knowledge, in order not to deceive and mislead the Public Hospital Districts and their patients. Defendants' disclosure of fragmentary information and half-truths constitutes material and actionable misrepresentation.

356. Defendants also purposefully placed themselves in a unique relationship to the Public Hospital Districts by expressly telling government and the public at large to place special trust and confidence in Defendants' promises to discover and disclose all material facts

about tobacco use, health and addiction. The Public Hospital Districts, which were and are responsible for providing unreimbursed health care services to patients, were and are in a vastly inferior position to discover truthful information about cigarettes and other tobacco products. Defendants voluntarily undertook the responsibility to discover and disclose the truth about cigarettes and other tobacco products and did so for the purpose of cultivating the trust and confidence of their consumers and of the Public Hospital Districts so as to induce the Public Hospital Districts to rely on Defendants' promises.

357. The Public Hospital Districts, which bear responsibility for providing unreimbursed health care services to patients, reasonably and justifiably relied on Defendants' material misrepresentations. The Public Hospital Districts lacked complete information regarding the effects of tobacco use on health, the relationship between nicotine and addiction, and Defendants' manipulation of levels of nicotine delivery to ensure addiction. As a result, the Public Hospital Districts justifiably relied on false or incomplete information in taking or not taking actions to discourage and reduce tobacco use by the Public Hospital Districts' patients.

358. Defendants were and are aware that the Public Hospital Districts and the general public depend on receiving complete information from government agencies concerning health risks, and Defendants have exploited this dependency to their advantage and to the detriment of the Public Hospital Districts and the public at large.

359. Defendants sought to induce the Public Hospital Districts' reliance on Defendants' representations

and promises to disclose the truth about cigarettes and other tobacco products, knowing that the Public Hospital Districts were in a vastly inferior position to discover the truth about cigarettes and nicotine products.

360. Defendants engaged in this fraudulent course of conduct for the purpose of influencing the market and reaping hugh profits, despite Defendants' duty to disclose all material information about the known defects in their products and the hazards of using them. Defendants' fraudulent statements and conduct, including their effect upon the market for tobacco products, was a substantial cause of persuading the Public Hospital Districts' patients to purchase and use deadly and addictive products. Defendants also sought to fraudulently shield themselves from having to pay the health care costs of tobacco-related diseases, which they knew would be incurred and would be extremely high, and to shift those costs to others, including the Public Hospital Districts.

361. The Public Hospital Districts reasonably and justifiably relied on Defendants' materially false, incomplete and misleading representations about tobacco use, health and addiction. As a result of such reliance, the Public Hospital Districts did not take, or would have taken sooner, actions to minimize the losses resulting from tobacco-related injuries and diseases and to discourage and reduce cigarette and other nicotine product use and the costs associated therewith by the Public Hospital Districts' patients.

362. As a direct, foreseeable and proximate result of Defendants' foregoing conduct, the Public Hospital Districts have suffered damages in the amount of the unreimbursed costs and expenses of medical care due to smoking and other tobacco use. These damages have

been directly borne by the Public Hospital Districts out of their own assets.

363. As a direct and proximate result of Defendants' fraudulent misrepresentations and nondisclosures, the Public Hospital Districts have suffered and will continue to suffer substantial injuries and damages for which the Public Hospital Districts are entitled to recovery and for which Defendants are jointly and severally liable.

COUNT 6

FRAUDULENT CONCEALMENT

[Against All Defendants]

364. The Public Hospital Districts restate and incorporate herein paragraphs 1 through 301 of this complaint.

365. Defendants represented and promised to those who advance and protect the public health and provide health care services that they would discover and disclose all material facts about the effects of cigarette smoking and other tobacco product use on human health, including addiction.

366. At all relevant times, however, Defendants intentionally, willfully or recklessly failed to disclose and they concealed material facts about the human health hazards of tobacco use, including addiction, and the association of cigarette smoking and other tobacco product use with various diseases of the heart, lungs and other vital organs.

367. By expressly and publicly raising the issue of smoking, health and addiction and making partial and incomplete statements about these issues, while actively

concealing other material information, Defendants had a duty to reveal all material facts of which they had notice or actual knowledge, in order not to deceive or mislead the Public Hospital Districts. Defendants' concealment of such material information concerning smoking, health and addiction constitutes material and actionable concealment.

368. The Public Hospital Districts, which bear responsibility for providing unreimbursed health care services, reasonably and justifiably relied on Defendants' material nondisclosures. The Public Hospital Districts thus lacked complete information regarding the effects of tobacco use on health, the relationship between nicotine and addiction, and the manipulation of levels of nicotine delivery to ensure addiction. As a result, the Public Hospital Districts justifiably relied on materially incomplete information in taking or not taking actions to discourage and reduce tobacco use by the Public Hospital Districts' patients.

369. Defendants engaged in this course of active concealment for the purpose of influencing the market and reaping huge profits, despite Defendants' duty to disclose all material information about the known defects in their products and the hazards of using them. Defendants' fraudulent concealment was a substantial cause of persuading the Public Hospital Districts' patients to purchase and use deadly and addictive products. Defendants also sought to fraudulently shield themselves from having to pay the health care costs of tobacco-related diseases, which they knew would be incurred and be extremely high, and to shift those costs to others, including the Public Hospital Districts.

370. The facts concealed by Defendants about tobacco use, health and addiction were material in that a

reasonable user would have considered them important in deciding whether to purchase and smoke cigarettes. The facts concealed by Defendants about tobacco use, health and addiction were material in that a reasonable provider of health care services would have considered them important in deciding how to best provide health care services.

371. The Public Hospital Districts reasonably and justifiably relied on Defendants' nondisclosures of material facts about cigarette smoking, use of other tobacco products and health. As a result of such reliance, the Public Hospital Districts failed to take, or would have taken sooner, actions to minimize their losses resulting from tobacco-related injuries and diseases and to discourage and reduce cigarette and other tobacco product use and the costs associated therewith by the Public Hospital Districts' patients.

372. As a direct, foreseeable and proximate result of Defendants' foregoing conduct, the Public Hospital Districts have suffered damages in the amount of the unreimbursed costs and expenses of medical care due to smoking and other tobacco use. These damages have been directly borne by the Public Hospital Districts out of their own assets.

373. As a direct and proximate result of Defendants' active concealment, the Public Hospital Districts have suffered and will continue to suffer substantial injuries and damages for which the Public Hospital Districts are entitled to recovery, and for which Defendants are jointly and severally liable.

COUNT 7

BREACH OF SPECIAL DUTY

[Against All Defendants]

374. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

375. Beginning as early as 1954 with the publication of "A Frank Statement to Cigarette Smokers" and continuing to the present, Defendants voluntarily assumed a special duty to protect the public health and a duty to those who advance the public health by providing health care services, including the Public Hospital Districts. Defendants promised and undertook to accept paramount responsibility for informing the public about health issues connected with their products, thus encouraging others to repose trust and confidence in them.

376. Defendants publicly represented that they were undertaking to act on behalf of the public's health, to aid and assist the research effort into all phases of tobacco use and health, to continue research and all possible efforts until all the facts were known, and to provide complete and objective information about all phases of cigarette smoking and health. Defendants thereby undertook a special duty to the Public Hospital Districts, their patients and the public at large.

377. The Public Hospital Districts reasonably and justifiably relied on Defendants' materially false, incomplete and misleading representations about tobacco use, health and addiction; Defendants' failure to reveal the possibility of safer, alternative tobacco products; and Defendants' nondisclosure of material facts about tobacco use and human health. As a result of such reliance, the Public Hospital Districts failed to take, or

would have taken sooner, actions to minimize their losses from tobacco-related injuries and diseases, as well as to discourage and reduce cigarette and other tobacco product use, and the costs associated therewith, by the Public Hospital Districts' patients.

378. Defendants' conduct as described herein is an intentional and/or negligent breach of Defendants' publicly announced special duty, special relationship or promise. Defendants failed to exercise reasonable care in the performance of their duty. Defendants not only did not carry out their duties and promises, but knowingly suppressed information about the adverse health effects of nicotine tobacco products; the addictive nature of those products; the possibility of an alternative, safer cigarette or alternative nicotine delivery product; and other information that would have assisted any effort to advance the public's health as it relates to nicotine tobacco use. Defendants knew and intended that their failure to fulfill their duty and promises would result in a detrimental impact on health care providers such as the Public Hospital Districts, as well as on the needs of the Public Hospital Districts' patients and the general public. As a direct and proximate result of Defendants' wrongful violation of their special duty and promises, the Public Hospital Districts have had to bear the costs of unreimbursed health care services. This has caused the Public Hospital Districts to suffer damages and injuries, including the costs and expenses of unreimbursed health care services to patients for nicotine-related diseases and illnesses and the treatment of nicotine addiction.

379. Defendants' continuing conduct is an ongoing and intentional breach of the special duty they undertook and owed to, among others, the Public Hospital

Districts. Defendants knowingly suppressed information that would have assisted any effort to advance the public's health as it relates to tobacco. This breach has resulted in a detrimental impact on the Public Hospital Districts' patients, the Public Hospital Districts and the general public.

380. As a direct and proximate cause of Defendants' breach, the Public Hospital Districts have suffered and will continue to suffer substantial injuries and damages, primarily in the form of the increased costs and expenses of unreimbursed health care services caused by tobacco-related illness, for which the Public Hospital Districts are entitled to recover and for which Defendants are jointly and severally liable.

COUNT 8

UNJUST ENRICHMENT

[Against All Defendants]

381. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of the complaint.

382. Defendants owe and continue to owe a duty to the public, including the Public Hospital Districts, not to deceive them regarding the dangers of smoking. Beginning with Defendants' "Frank Statement," Defendants assumed and continue to owe a duty to the Public Hospital Districts to research the dangers of smoking and to disclose the results.

383. Defendants, through the deceptive practices and the breaches of duty described in this complaint, have induced many of the Public Hospital Districts' patients to purchase the Tobacco Companies' cigarettes and other tobacco products and, as a consequence, to suffer

diseases and illnesses related to the use of the Tobacco Companies' products.

384. The Public Hospital Districts have borne, and continue to bear, the substantial costs of unreimbursed health care services to patients, particularly the diagnosis and treatment of diseases and illnesses related to the use of the Tobacco Companies' tobacco products.

385. Because the Public Hospital Districts have expended sums that Defendants had, and continue to have, a duty to pay but have avoided paying by deceit, mendacious lobbying efforts, propaganda, scorched-earth and illicit and deceptive litigation tactics and other means, the Public Hospital Districts have conferred a benefit upon Defendants.

386. Inasmuch as Defendants caused the health care expenses to be incurred through the use of fraudulent and unlawful means and breaches of a special and assumed duty as described in this complaint, and avoided paying such expenses by illicit means, Defendants' retention of the benefit so conferred upon them by the Public Hospital Districts would be unjust.

387. In equity and good conscience, Defendants should be ordered to pay restitution to the Public Hospital Districts for those sums expended, and to be expended in the future, by the Public Hospital Districts for unreimbursed health care services incurred as a result of Defendants' conduct.

COUNT 9

CONSPIRACY

[Against All Defendants]

388. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

389. Defendants entered into an unlawful conspiracy to engage in all the wrongful and unlawful conduct described herein, including (a) suppressing information concerning the adverse effects of smoking and the addictive effect of nicotine; (b) creating doubt about scientific studies that showed the addictive nature of nicotine and linking smoking to adverse health consequences and about warnings related thereo; (c) concealing their manipulation of the level of nicotine in tobacco products; (d) avoiding competition by agreeing not to produce safer products as substitutes for their nicotine tobacco profits; and (e) misinterpreting their intentions, knowledge, goals and purposes to the Congress of the United States, state legislatures, relevant regulatory authorities, the public, and persons in the health field, including the Public Hospital Districts.

390. The intended purposes of this conspiracy were to deceive the citizens of the United States, including the patients of the Public Hospital Districts, about the true nature of Defendants' products; to restrain the development of a market for a safer or alternative product; to prevent smokers and users of tobacco products from abandoning Defendants' products; and to shift unreimbursed nicotine-related health care costs to the Public Hospital Districts. As a proximate result of this unlawful conspiracy, the Public Hospital Districts have been injured in their business and property and have

been required to bear increased health care costs associated with tobacco-related illnesses and diseases.

391. Defendants' unlawful conduct will continue unless the relief prayed for in this complaint is granted.

COUNT 10

WASHINGTON UNFAIR BUSINESS PRACTICES ACT – CONSUMER PROTECTION ACT (RCW 19.86.020)

[Against All Defendants]

392. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

393. Washington's Unfair Business Practices Act, RCW 19.86.020, states:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

394. The conduct described above and throughout this complaint constitutes unfair methods of competition and/or unfair or deceptive acts or practices, all in the sphere of trade or commerce and impacting the public interest, in violation of RCW 19.86.020.

395. As a direct and proximate result of such wrongful activity, the Public Hospital Districts have suffered and will continue to suffer substantial damages and injuries to their businesses or property, including but not limited to the substantial costs of unreimbursed health care services for disease, illness, addiction and adverse health consequences caused by cigarettes and other tobacco products.

396. The Public Hospital Districts have been and continue to be injured in their businesses or property by Defendants' violations of RCW 19.86.020, and the Public Hospital Districts are "persons" within the meaning of, and are entitled to bring this action under, RCW 19.86.090.

397. Under RCW 19.86.090, the Public Hospital Districts are entitled to recover three times the amount of actual damages sustained, the costs of bringing this action, and reasonable attorney fees.

COUNT 11

WASHINGTON UNFAIR BUSINESS PRACTICES – CONSUMER PROTECTION ACT (RCW 19.86.030)/WASHINGTON STATE CONSTITUTION

[Against All Defendants]

398. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

399. RCW 19.86.030 states:

> Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

400. Beginning at a time uncertain, but at least as early as the 1950s, and continuing to the present, Defendants have entered into a combination or conspiracy in restraint of trade and commerce in the market for cigarettes or other nicotine products in the United States, including the state of Washington, in willful and/or flagrant violation of RCW 19.86.030, Washington's analog to Section 1 of the Sherman Act, and in violation of Article XII, Section 22 of the Constitution of the State of Washington.

401. As a direct and proximate result of the combination or conspiracy, the Public Hospital Districts were injured in their businesses and property (a) by Defendants' conspiracy in the market for cigarettes or other nicotine tobacco products, including the suppression of a relevant submarket for safer cigarettes or other nicotine products that would have existed but for Defendants' unlawful conduct, and/or (b) as a purchaser in the broad market for drugs and as a potential purchaser in the relevant submarket for safer cigarettes or other nicotine products.

402. Under RCW 19.86.090, the Public Hospital Districts are entitled to recover three times the amount of actual damages sustained, the costs of bringing this action, and reasonable attorney fees.

403. The Public Hospital Districts are also entitled to injunctive relief directing Defendants to cease and desist from conspiring to suppress the research, development and marketing of safer cigarettes and directing Defendants to take such further steps as the Court may deem necessary and appropriate to reverse the anti-competitive effects of Defendants' conspiracy.

COUNT 12

PUBLIC NUISANCE

[Against All Defendants]

404. The Plaintiffs restate and incorporate herein paragraphs 1 through 301 of this complaint.

405. Defendants have unreasonably and unlawfully interfered with the public's right to be free from unwarranted injury, disease and sickness and have caused damage to the public health, the public safety and the

general welfare of the communities served by the Public Hospital Districts, thereby causing the Public Hospital Districts to spend millions of dollars in support of the public health and welfare.

406. By the wrongful and unreasonable conduct alleged above, including Defendants' distribution and marketing of tobacco products to the public without disclosure of information in their sole possession relating to the harmful health effects and addictive properties of their products, their deliberate and intentional campaign to confuse and deceive the public concerning those addictive and harmful health effects, their distribution and marketing of tobacco products with the intent to induce the addiction of minors and minorities as well as the poor and uneducated in the communities served by the Public Hospital Districts, Defendants have unreasonably endangered and injured the public's health and interfered with the public's right to be free from the widespread distribution of substances causing disease and dependency and right to be knowledgeable concerning the dangers of defendants' products.

407. These wrongful acts constitute a public nuisance prohibited by RCW 7.48 and common law.

408. As a result of the foregoing, the Public Hospital Districts have borne and continue to bear the costs of unreimbursed health care services for tobacco-related disease, illness and addiction. These are special damages not common to the public at large, for which Defendants are jointly and severally liable.

409. Unless Defendants are enjoined and restrained from continuing their harmful activities and ordered to take affirmative steps to undo and abate the harm and confusion caused by their harmful activities, the unrea-

sonable endangerment and interference with the public health as described above will continue, for which the Public Hospital Districts have no adequate remedy at law.

VI . JURY DEMAND

Under Federal Rule of Civil Procedure 38, Plaintiffs respectfully demand a jury on all triable issues.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment against Defendants, jointly and severally, as follows:

1. Adjudging and decreeing that Defendants engaged in the conduct alleged herein, acting in concert, and declaring that by such conduct, Defendants have violated the provisions of the Clayton Act and the Sherman Act, the Racketeering Influenced Corrupt Organizations Act, the common law and Constitution of Washington, RCW 19.86, and RCW 7.48.

2. Enjoining and restraining Defendants and their officers, agents, servants and employees, and those in active concert or participation with them, from continuing to engage in or engaging in restraints of trade, racketeering, unfair and deceptive trade practices and other wrongful or unlawful conduct similar in purpose or effect to the wrongful or unlawful conduct described herein and, without limiting the generality of the foregoing, ordering Defendants and their officers, agents, servants and employees, and those in active concert or participation with them:

a. To cease and desist from conspiring to suppress the research, development and marketing of safer

cigarettes and other tobacco products and to take such further steps as the Court deems necessary and appropriate to reverse the anticompetitive effects of Defendants' conspiracy;

b. To cease developing, manufacturing or marketing cigarettes or other products with raised, enhanced, changed, altered or manipulated levels of nicotine or nicotine impact for the purpose of creating or sustaining nicotine addiction;

c. To cease developing, growing or importing nicotine-enriched or high-yield nicotine tobacco leaf in the United States or abroad or hiring third parties to do so;

d. To cease any attempt to addict any person to nicotine and to otherwise cease interfering with or causing damage to the Public Hospital Districts' programs or smoking cessation activities;

e. To disclose the nicotine yields of their products based on machine tests and human confirmation studies for each brand;

f. To cease targeting minors in marketing;

g. To cease targeting minorities, the poor and uneducated in marketing; and

h. To publicly disclose and publicize all information and research relating to smoking health and addiction and to publicly state that Defendants know and have known for years that cigarettes and other tobacco products are harmful and addictive, indicating what diseases and illnesses are associated with Defendants' products and acknowledging that the development and marketing of alternative safer or less addicttive cigarettes has been suppressed.

3. Requiring Defendants to pay restitution to the Public Hospital Districts for the amounts incurred by Plaintiffs that in fairness should be paid by Defendants.

4. Awarding damages and compensation to the Public Hospital Districts in an amount to be determined for all past and future harm suffered by the Public Hospital Districts as a result of Defendants' conduct as alleged herein, including but not limited to all past and future costs and expenditures for unreimbursed health care services to patients, including diseases, illnesses, and nicotine addiction, associated with tobacco products.

5. Ordering treble damages in accordance with 18 U.S.C. §1964(c), 15 U.S.C. §15, and RCW 19.86.090.

6. Requiring Defendants to disgorge all unjust profits from sales of tobacco products to the Public Hospital Districts' patients, which in equity and good conscience Defendants should not be allowed to retain.

7. Ordering pre- and postjudgment interest and all costs, as provided by law.

8. Awarding the AWPHD and the Public Hospital Districts their reasonable attorney fees and costs.

9. Granting such other and further relief as the Court deems equitable, just and proper.

DATED this 2nd day of July, 1999.

FOSTER PEPPER & SHEFELMAN PLLC

/s/ Christopher Kane
Michael K. Vaska (WSBA No. 15438)
Bradley J. Berg (WSBA No. 14231)
Christopher Kane (WSBA No. 4999)
Chryssa Deliganis (WSBA No. 28551)
1111 Third Avenue, Suite 3400

Seattle, Washington 98101
(206) 447-4400
Attorneys for Plaintiffs

APPENDIX B

[Filed DEC 13 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C98-1675Z

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, et al.,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED, et al.,

Defendants.

ORDER

Plaintiffs are Public Hospital Districts in counties throughout Washington State, and the trade association of these hospital districts (collectively, the "plaintiffs"). Defendants are tobacco companies and related entities associated with the tobacco manufacturers (collectively, the "defendants"). Plaintiffs have brought federal and state claims against defendants for the unreimbursed health care costs associated with treating patients with smoking-related illnesses. This matter comes before the Court on the defendants' motion to dismiss pursuant to

Fed.R.Civ.P. 12(b)(6), docket no. 34. The Court heard oral argument on October 15, 1999, and took the matter under advisement. The Court has considered the briefs of the parties and the oral argument of counsel and now GRANTS defendants' motion to dismiss for the reasons stated in this order.

BACKGROUND

Plaintiffs, political subdivisions of the State of Washington, are required by law to provide medical care and services for the residents of their districts. RCW 70.44.-003. Each plaintiff alleges that it was required by law to provide unreimbursed health care services to patients who have suffered from tobacco-related diseases. Second Amended Complaint ("SAC"), ¶¶ 1 and 17; RCW 70.-170.060. Plaintiffs allege that defendants engaged in deceptive acts and conspired to perpetuate smoking and nicotine addiction in the United States. Plaintiffs further allege that the tobacco companies have forced the public hospitals and others to bear the cost of such care. Plaintiffs seek to recover the unreimbursed portion of this cost, SAC at ¶¶ 1-10, as well as other equitable and injunctive relief.

Plaintiffs seek recovery under various legal theories including federal antitrust violations, RICO violations, fraudulent misrepresentation, fraudulent concealment, breach of a special duty to disclose health hazards, unjust enrichment, conspiracy, violations of the Washington Consumer Protection Act, and public nuisance. Defendants have moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss plaintiffs' claims for several reasons, including, but not limited to: (1) plaintiffs' claims are too remote and wholly derivative of injuries to unnamed smoker-patients; and (2) plaintiffs' losses are in fact expenses

which the plaintiffs had a duty to incur. Defendants' memo in supp., docket no. 35, at 1.

Plaintiffs here bring claims similar to other plaintiffs who have unsuccessfully sought recovery for injuries that derive from the treatment of smokers' illnesses. In *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3274 (U.S. Oct. 12, 1999) (No. 99-642) the Ninth Circuit affirmed the dismissal of the plaintiff union trusts' claims for failure to state a claim. In that case, the Court concluded that plaintiffs' claims were "too remote" from defendants' alleged wrongdoing to allow recovery. *Id.* at 964. In other words, there was no showing of a direct link between the alleged misconduct of many of the same defendant tobacco companies and the alleged damage to the union trusts. Three other Circuits have reached the same result. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 1999 WL 639865 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3327 (U.S. Nov. 4, 1999) (No. 99-791); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3251; *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, ___ F.3d ___ , 1999 WL 1034711 (7th Cir. Nov. 15, 1999) (No. 99-1197, 99-3397, 99-1014, 99-3396). This Court has dismissed similar derivative actions by third party payors of medical costs. *Regence Blueshield v. Philip Morris, Inc.*, 40 F. Supp. 2d 1179 (W.D. Wash. 1999), appeal docketed, No. 99-35204 (9th Cir. March 1, 1999); *see also Int'l Bhd. of Teamsters*, ___ F.3d ___ , 1999 WL 1034711 (dismissing claims by Blue Cross and Blue Shield, consolidated with trust fund suits).

Plaintiffs in these cases asserted the same federal, state statutory, and common law claims now alleged in the present case.

The issue presented in this case is whether plaintiffs' claims are different than the previous unsuccessful claims of the union trusts and third party insurance providers. For the reasons stated in this order, the Court concludes that they are not; the rationale of *Oregon Laborers* is fatal to plaintiffs' claims and this case must be dismissed. As in *Oregon Laborers*, plaintiffs' claims in this case are derivative of the harm suffered by non-party smokers and the defendants did not proximately cause the injuries alleged.

ANALYSIS

(A) Rule 12(b)(6) Standard

On a motion to dismiss under Rule 12(b)(6) the Court must accept as true all plaintiffs' allegations and construe those allegations in the light most favorable to plaintiffs. *NOW v. Scheidler*, 510 U.S. 249, 256, 127 L.Ed.2d 99 (1994); *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir.), *cert. denied*, 119 S.Ct. 444, 142 L.Ed.2d 399 (1998). Thus, the complaint should be dismissed for failure to state a claim only if plaintiffs can prove no set of facts which would entitle them to relief.

For purposes of this motion, the Court assumes that the following facts alleged by plaintiffs are true. Tobacco use is harmful to the user's health. *See* SAC ¶¶73-82. The defendants had evidence of this fact for many years and have conspired to withhold this information from the public, including the public health care industry. *See id.* ¶¶87-163. This lack of information prevented plaintiffs from properly informing its patients about the dan-

gers of tobacco use and delayed the implementation of programs to reduce tobacco use. *See id.* ¶¶17-18, 317-319. The defendants conspired to suppress the research and development of less harmful tobacco products. *See id.* ¶¶204-234, 304-310. The absence of less harmful tobacco products prevented public health officials from encouraging patients to utilize safer products. *See id.* ¶¶317-319, 401. Plaintiffs have incurred costs associated with the unreimbursed health care treatment of tobacco-related illnesses. *See id.* ¶¶1-3. Had the defendants not withheld information and suppressed research into less harmful products, fewer patients would have used the more harmful products. *See id.* ¶¶4-10. Consequently, fewer patients would have developed a tobacco-related illness and the public hospitals' costs for providing medical treatment for such illnesses would have been reduced. *See id.* ¶10. Based on these alleged facts, plaintiffs argue that injury to their business and property arose as a direct result of the defendants' conduct.

(B) Antitrust Claims

Plaintiffs allege violations of the Sherman Act, 15 U.S.C. §1 and RICO, 18 U.S.C. §1964(c). Both statutes provide a private right of action only to those plaintiffs "injured in [their] business or property by reason of" a violation of the laws' substantive provisions. *Oregon Laborers,* 185 F.3d at 963; 18 U.S.C. §1964 (RICO); 15 U.S.C. §15(9) (antitrust). Both statutes also require that the alleged violation be a "proximate cause" of the injury suffered. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 477, 73 L.Ed.2d 149 (1982) (antitrust); *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 258, 117 L.Ed.2d 532 (1992) (RICO). Proximate cause means that the injury to business and property

must be directly caused by the conduct alleged. Thus, plaintiffs asserting antitrust or RICO claims must establish both "standing" or "proximate cause" as well as an "antitrust injury" to recover. Each requirement must be analyzed separately.

(1) Antitrust Standing and Proximate Cause

"The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct." *American Ad Management Inc. v. GTE of California,* 190 F.3d 1051, 1055 (9th Cir. 1999). Antitrust laws are only intended to preserve competition for the benefit of consumers. *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 538, 74 L.Ed.2d 723 (1983). The concept of antitrust standing requires the Court to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated General Contractors,* 459 U.S. at 535. The Supreme Court has identified several factors to be considered in determining whether a plaintiff has antitrust standing: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Amarel v. Connell,* 102 F.3d 1494, 1507 (9th Cir. 1997), *citing Associated General Contractors,* 459 U.S. at 535.

(a) Nature of the injury

"The antitrust laws . . . were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488, 50 L.Ed.2d 701 (1977) (citations and quotations omitted).

The corollary is that the injured party must be a participant in the same market. *Bhan v. NME Hospitals, Inc.*, 772 F.3d 1467, 1470 (9th Cir. 1985). Plaintiffs' contention, that they are "direct purchasers of . . . nicotine delivery products for the treatment of nicotine addition," and thus "consumers in the same market," SAC ¶ 10, is without merit. It cannot be said that plaintiffs either compete with the tobacco companies in the manufacture or sale of cigarettes or that they directly consume these products. To the extent plaintiffs have suffered damages, their claims are derivative of the injuries suffered by the smoker patients.

(b) Directness of injury

Plaintiffs allege both a "direct" and an "indirect" injury as a result of defendants' conduct, specifically that defendants conspired to withhold information from plaintiffs that was necessary to properly diagnose and treat smoking as an addiction. Plaintiffs argue that "the tobacco [d]efendants' conspiracy made the [p]laintiffs unwitting accomplices in increasing their own injuries." Plaintiffs' memo in opp., docket no. 84, at 2. Thus, plaintiffs contend, the defendants' conspiracy resulted in a direct injury to plaintiffs' business and property. Plaintiffs also allege indirect injury in the form of excessive costs necessary to treat their smoker-patients.

A direct relationship between the injury and the alleged wrongdoing is "one of [the] central elements" of proximate causation in antitrust claims. *See Holmes*, 503 U.S. at 269, *citing Associated General Contractors*, 459 U.S. at 540; *see also Oregon Laborers*, 185 F.3d at 963. Smokers that have become ill as a result of using tobacco products are the direct victims of the misconduct asserted in this litigation. These smokers can bring

claims directly against the tobacco companies for their injuries. The existence of these more direct victims of the alleged wrongful conduct weighs in favor of barring plaintiffs' claims.

In *Oregon Laborers*, 185 F.3d at 961, six Oregon-based employee health and welfare trust plans filed suit against various tobacco companies based upon federal antitrust, RICO and other state law claims. The case was dismissed on motion for summary judgment and affirmed by the Ninth Circuit. The plaintiffs in *Oregon Laborers* alleged claims against the tobacco defendants very similar to those presented in this case. The Ninth Circuit, following the Supreme Court's lead in *Holmes*, 503 U.S. at 269, held that the claims were too remote to allow recovery under RICO and antitrust laws, reasoning:

> A direct relationship between the injury and the alleged wrongdoing, although not the sole requirement of RICO and antitrust proximate causation, has been one of its central elements. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remove a distance to recover. (citations and quotations omitted)

Like the plaintiffs in *Oregon Laborers*, plaintiffs' alleged injuries are derivative by nature. The injuries to plaintiffs occur only if there is first an injury to smoking patients. *Oregon Laborers*, 185 F.3d at 963. Without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. *Id.* There is therefore no direct link between the alleged misconduct of the tobacco companies and the claimed damage to plaintiffs. *See Id.*; *Laborers Local 17*, 191 F.3d at 239 (dismissing RICO claims because trust funds' damages "are entirely

derivative of the harm suffered by plan participants as a result of using tobacco products"); *Steamfitters*, 171 F.3d at 928 (holding that regardless of plaintiffs' characterization as direct or indirect, claims "fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part.")

(c) Speculative nature of harm

Plaintiffs allege that but for the defendants' conspiracy, they would have "many years earlier" diagnosed smoking as an addiction, banned or limited the sale of cigarettes on their premises, and taken other steps to ensure their patients were properly diagnosed and treated. SAC, ¶ 371. Plaintiffs contend that theses steps "would have reduced [their] damages from treating smoking-related diseases." Plaintiffs' memo in supp., docket no. 84, at 4. In order to calculate damages, plaintiffs would be required to prove how many smokers would have stopped smoking with more information, how many would have smoked less dangerous products, how much healthier these hypothetical reformed smokers would have been, and how much less unreimbursed care and services would have been incurred by the plaintiffs. These damage claims are highly speculative in light of the multitude of factors that might affect damages. "The difficulty of ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions." *Oregon Laborers*, 185 F.3d at 965.

(d) Risk of duplicative recovery and complexity in apportioning damages

Plaintiffs have already been reimbursed, in part, for services under Medicare and Medicaid and have accepted reimbursement "as payment in full." 42 CFR §447.15; WAC 388-550-3000(6). Other litigation pursued directly by smokers or by the State of Washington has resulted or will result in substantial recoveries or settlements. The Court would be forced to adopt complicated rules apportioning damages to eliminate the risk of multiple recoveries. This factor also weighs in favor of barring plaintiffs' action.

(e) Standing and proximate cause precedents

Several other courts have held that third party insurers and trusts funds lacked standing to sue tobacco companies for medical care costs of smoking-related illness. *See, e.g., Laborers Local 17,* 191 F.3d at 239; *Oregon Laborers,* 185 F.3d at 969; *Steamfitters,* 171 F.3d at 927; *Regence Blueshield,* 40 F. Supp. 2d at 1185. In each case, plaintiffs could not demonstrate that the defendants proximately caused their injuries.

Plaintiffs attempt to distinguish these cases by demonstrating the differences between insurance providers and health and welfare trust funds, on the one hand, and the Public Hospital Districts, on the other. Unlike the insurance providers and union trusts funds, plaintiffs argue they have a duty to safeguard public health, an obligation to provide care even if smokers cannot pay, and no subrogation rights. Thus, plaintiffs directly incur the costs of treating smoking-related illness through unreimbursed medical treatment of patients, unlike insurers who pass such costs on to their insureds. Plaintiffs also claim to provide advice about smoking and

health, and directly purchase nicotine products to treat those addicted to tobacco. Plaintiffs rely on these alleged differences to argue that they have standing to bring their claims in this litigation. The Court is unconvinced; these claimed differences in the structure and functions of the Public Hospital Districts do not support standing to bring these antitrust and RICO claims. Plaintiffs bring claims which are almost identical to the claims of the third party insurers and health and welfare trust funds. "[N]o amount of semantic gymnastics can detract from the conclusion that [plaintiffs'] claims are completely derivative of the personal injuries to [smokers] allegedly caused by the defendants' conduct." *Regence Blueshield*, 40 F. Supp. 2d at 1184.

Plaintiffs further allege that their special relationship with patients confers standing, relying in part upon the decisions in *Singleton v. Wulff*, 428 U.S. 106, 112-13, 49 L.Ed.2d 826 (1976) (ruling that respondent-physicians suffered concrete injury from an anti-abortion statute that denied physicians Medicaid reimbursement for abortions not "medically indicated"); and *Lee v. State of Oregon*, 869 F. Supp. 1491, 1494-95 (D. Or. 1994) (holding doctors had third party standing to challenge physician-assisted suicide based on showing of direct financial impact on their practices). These cases have allowed doctors to challenge laws that directly impacted their medical practice. However, these cases do not provide support for granting plaintiffs standing under the antitrust laws.

Plaintiffs also base standing on the duty owed by hospitals to their patients. *See Niece v. Elmview Group Home*, 131 Wn. 2d 39, 48, 929 P.2d 420 (1997) (holding Courts have held that hospitals have a "duty to protect its patients from the tortious or criminal actions

of third parties" due to "the special relationship between the hospital and the patient."); *Douglas v. Freeman*, 117 Wn. 2d 242, 248, 814 P.2d 1160 (1991) (ruling that hospitals owe non-delegable duty directly to their patients). Public hospitals must provide care for their patients regardless of their ability to pay. RCW 70.170.-060. Plaintiffs allege that this duty distinguishes the cases of third party payors, who had merely a contractual relationship with the injured smokers.

Unquestionably hospitals have a duty to protect their patients. But hospitals may not generally sue companies who have caused their patients' illnesses. Could plaintiffs sue an auto manufacturer for the unreimbursed costs of treating a patient injured as a result of a defective car? Could plaintiffs sue food manufacturers for the unreimbursed costs of treating persons injured as a result of food poisoning? In these hypothetical cases, plaintiffs could not show that the defendant's actions proximately caused their injuries. The same is true here. Thus, plaintiffs do not have standing to sue the tobacco companies for the unreimbursed costs of treating smokers.

(f) Conclusion: plaintiffs do not have standing

Each of the factors identified in *Associated General Contractors* weigh against antitrust standing in this case. Plaintiffs alleged damages were not the type the antitrust laws were intended to forestall. The claimed damages are highly speculative and uncertain. Allowing the case to proceed could result in duplicative and complex damages. Plaintiffs' damages are derivative of injuries to others and they cannot demonstrate proximate cause.

(2) Antitrust Injury

Even if plaintiffs could demonstrate standing, they must also demonstrate an antitrust injury. An "antitrust injury" is an injury of the type the antitrust laws were intended to prevent. *Associated General Contractors,* 459 U.S. at 540. Plaintiffs must have suffered their alleged antitrust injury in the market where competition is being restrained. *American Ad Mgmt.,* 190 F.3d at 1057.

Defendants are in the market of selling cigarettes and tobacco products, while plaintiffs are in the health care market. Plaintiffs attempt to stretch the definition of market by labeling the tobacco companies "sellers in the broad U.S. market for drugs." SAC, ¶80. Plaintiffs assert that they are purchasers of drugs, including "nicotine delivery products" used to treat nicotine addiction. However, plaintiffs' alleged injuries did not arise from their purchase of nicotine products but from their patients' consumption of tobacco products. Plaintiffs and tobacco companies are not in the same market; they are neither consumers, competitors, suppliers, or dealers, nor do they have a sufficiently close tie with the tobacco market.

"Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *American Ad Mgmt.,* 190 F.3d at 1057. Because the plaintiffs and defendants are in different markets, no "antitrust injury" occurred. *See Bhan,* 772 F.2d at 1470; *see also Steamfitters,* 171 F.3d at 926. Interpreting the definition of market as broadly as plaintiffs suggest would enable dentists to sue candy makers for their unreimbursed cost of treating their patients' cavities.

The Court declines to so extend the scope of the antitrust laws.[1]

(C) RICO Claims

(1) RICO Standing

Plaintiffs must have standing to assert their RICO claims against the defendants. The standing requirements under RICO are similar to those under antitrust law. *See Holmes,* 503 U.S. at 268; *Oregon Laborers,* 185 F.3d at 963. Thus, the Court's analysis for antitrust standing is applicable for RICO.

Plaintiffs rely heavily on *NOW v. Scheidler,* 510 U.S. 249, 256, 127 L.Ed.2d 99 (1994) in support of RICO standing. In *Scheidler,* the Court allowed abortion clinics to pursue RICO claims against anti-abortion protesters who allegedly conspired to use or threaten violence against clinic employees, doctors and patients. The conspiracy was actively directed at the clinics and their employees, and the injuries to clinic business were directly caused by the defendants' alleged activities. The Supreme Court held that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific

[1] One narrow exception to this market participant requirement is for parties whose injuries are "inextricably intertwined" with the injuries of market participants. *See McCready,* 457 U.S. at 484 (granting standing to psychologists to challenge restrictions for psychotherapeutic services). This test requires that the plaintiffs are a "necessary means to achieve the conspirators' illegal end as well as an integral and inextricable part of the anticompetitive scheme." *Ostrofe v. H.S. Crocker Co.,* 740 F.2d 739, 746 (9th Cir. 1984). The injury to plaintiffs is not "inextricably intertwined" with the tobacco companies' unlawful activities. The injuries sustained by plaintiffs were incidental to the alleged scheme of the defendants, and occurred in a completely distinct market.

facts that are necessary to support the claim . . . Nothing more is needed to confer standing." *Id.* (citations omitted). Plaintiffs allege that "[a]s in *Scheidler,* the PHDs are health care providers who have alleged injuries to business and property as a result of the Tobacco defendants' predicate RICO acts." Plaintiffs' memo in opp., docket no. 64, at 11. However, the activities of the tobacco companies in this case were not directly aimed at causing injury to plaintiffs. Rather, plaintiffs suffered incidental damage as a result of the injuries to smokers who were the direct target of the defendants' activities. Plaintiffs have alleged no specific facts that could overcome the proximate cause and standing concerns of the Court.

Plaintiffs also rely on *Pharmacare v. Caremark,* 965 F. Supp. 1411 (D. Haw. 1996). In that case, the court denied a motion to dismiss RICO claims brought by a healthcare provider against a competitor who had illegally paid doctors for patient referrals. The Court held that plaintiffs had standing to pursue their RICO claims because the alleged fraud could foreseeably affect the plaintiffs. There, the plaintiffs were the direct target of the defendants' scheme to obtain an unfair competitive advantage by fraudulently soliciting these referrals. Here, however, the tobacco companies would not stand to benefit competitively by harming plaintiffs, and plaintiffs were not the direct target of the defendant's activities. Therefore, plaintiffs lack standing for their RICO claims.

(2) RICO Injury

The RICO statute also requires that the alleged violation of the law be a "proximate cause" of the injury suffered. *See Holmes,* 503 U.S. at 268. Plaintiffs claims

in this action are too remote to allow recovery under RICO. *Oregon Laborers,* 185 F.3d at 963; *see also Imagineering, Inc. v. Kiewit Pacific Co.,* 976 F.2d 1303 (9th Cir. 1992), *cert. denied,* 507 U.S. 1004, 123 L.Ed.-2d 266 (1993) (holding that subcontractors lacked standing to bring RICO claim against defendant, whose fraud allegedly caused their prime contractor to lose bid); *Pillsbury, Madison & Sutro v. Lerner,* 31 F.3d 924, 929 (9th Cir. 1994) (affirming dismissal of subtenant's RICO claim that defendant's fraudulent acts raised master tenant's rent, which was passed on to plaintiff). Here again, plaintiffs cannot get beyond the fact that any injuries they might have suffered occurred only as a result of injuries suffered first by individual consumers of the defendant's product. Plaintiffs cannot therefore show that their injuries were proximately caused by defendant's conduct.

D. State Law Claims

1. Fraudulent Concealment and Misrepresentation

Plaintiffs' fifth and sixth claims are for fraudulent misrepresentation and fraudulent concealment under Washington State law. An essential element of any claim for fraud is proximate cause. *Amtruck Factors v. International Forest Products,* 59 Wn. App. 8, 14, 795 P.2d 742 (1990), *rev. denied,* 116 Wn. 2d 1003, 803 P.2d 1310 (1991). For the reasons heretofore stated, plaintiffs cannot establish proximate cause in this case as a matter of law. *Oregon Laborers,* 185 F.3d at 964.

2. Breach of Special Duty

Count 7 of plaintiffs' complaint alleges that the defendants breached a special duty owed by defendants to the plaintiffs under Washington State law. Plain-

tiffs allege that defendants voluntarily assumed a special duty to protect public health by making statements to the public, beginning with the "Frank Statement to Cigarette Smokers" in 1954. SAC, ¶375. Plaintiffs allege that the defendants breached that duty by suppressing information vital to the public health, such as the addictiveness of nicotine and the relationship between disease and tobacco use. According to plaintiffs, the breach of this duty caused more smokers to smoke, and the public hospitals to bear increased health costs.

The existence of a special duty is an issue of law in Washington. *Hanson v. Friend,* 118 Wn. 2d 476, 479, 824 P.2d 483 (1992). Even assuming the "Frank Statement to Cigarette Smokers" created a special duty to the public health community, plaintiffs cannot establish that any breach proximately caused the damages claimed. *State of Washington v. American Tobacco Co.,* 1996 WL 931316, *8 No. 96-2-15056-8-SEA, (Wash. Sup. Ct. Nov. 19, 1996) (rejecting similar special duty claim under Washington law against Tobacco defendants); *Herskovits v. Group Health Cooperative,* 99 Wn. 2d 609, 617, 664 P.2d 474 (1983) (holding proximate cause required for claim of breach of special duty).

In addition, a claim of a breach of a special duty requires "physical harm" to plaintiffs. Restatement (Second) of Torts §323; *Herskovits,* 99 Wn. 2d at 615; *American Tobacco, Co.,* 1996 WL 931316 at *7 (dismissing claim of breach of special duty for lack of physical harm). This element is also missing in the present case.

3. Unjust Enrichment

Plaintiffs allege in Count 8 that defendants have been unjustly enriched by their treatment of smokers. Plaintiffs contend that the defendants owe a duty to the public (including the plaintiffs) not to deceive people about the dangers of smoking. SAC, ¶ 382. They claim that the tobacco companies owed a duty to plaintiffs to research the dangers of smoking and disclose the results. *Id.* However, plaintiffs do not assert that defendants actually had an obligation to pay the medical costs of the smoker-patients treated by the plaintiffs. Without such an allegation, plaintiffs cannot maintain their claim for unjust enrichment. *American Tobacco,* 1996 WL 931316 at *6 (dismissing similar unjust enrichment claim).

Plaintiffs' unjust enrichment claim turns on whether their treatment of smokers benefitted defendants. Washington courts have defined a benefit as any form of advantage:

> A person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or duty of the other, or in any way adds to the others' security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word benefit, therefore, denotes any form of advantage.

American Tobacco Co., 1996 WL 931316 at *8 *quoting Chemical Bank v. Washington Public Power Supply Sys.,* 102 Wn. 2d 874, 910, 691 P.2d 524 (1984), *cert. denied,* 471 U.S. 1065, 85 L.Ed.2d 497 (1985) (citations and quotations omitted).

Plaintiffs do not claim to have given the tobacco companies possession of or an interest in services rendered. Plaintiffs provided medical treatment to smokers, and the benefits of that treatment went to the patients, not the defendants. Without alleging that the defendants are responsible for the medical costs of their patients, the alleged benefits that plaintiffs conferred on the defendants are too indirect and speculative to support its unjust enrichment claim under Washington law. *See American Tobacco Co.*, 1996 WL 931316 at *9; *see also Chemical Bank*, 102 Wn. 2d at 910-11. Plaintiffs cannot maintain an action for unjust enrichment against defendants merely because defendants were incidentally benefitted by their treatment of smokers. *See Oregon Laborers*, 185 F.3d at 968. Without a legal obligation on the part of defendants to pay, the treatment by plaintiffs did not "benefit" the defendants, and the unjust enrichment claim fails. *See id.*

4. Consumer Protection Act

Plaintiffs also seek recovery under the Washington Consumer Protection Act, RCW 19.86.020-030. In order to recover under this claim plaintiffs must allege an injury to their business or property causally related to the alleged unfair act or practice. *Washington State Physicians Ins. Exchange & Ass'n. v. Fison Corp.*, 122 Wn. 2d 299, 312, 858 P.2d 1054 (1993).

The alleged injuries to plaintiffs are based on personal injuries to smokers. Plaintiffs allege that the defendants' conspiracy to restrict trade suppressed the development, manufacture, and sale of safer tobacco products. Plaintiffs further allege that the lack of safer tobacco increased the number of smokers seeking treatment at public hospitals, thereby increasing their costs. Ex-

penses for personal injuries are not injuries to business or property under the Washington Consumer Protection Act. *See Northwest Laborers*, 58 F. Supp. 2d at 1215; *Fison*, 122 Wn. 2d at 318; *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989). Judge Dwyer explained in *Northwest Laborers*, 58 F. Supp. 2d at 1215, that this general rule "cannot change when the injured person's medical expenses are paid by someone else." The costs derived from these personal injuries do not become less "personal" when borne by plaintiffs in the form of unreimbursed health care services. Thus, these costs cannot be recovered under the Washington Consumer Protection Act.[2]

5. Nuisance

Plaintiffs' twelfth claim alleges that defendants perpetrated a public nuisance. Plaintiffs contend that the defendants' actions endangered the public health, causing the public hospitals (and others) to bear the costs of unreimbursed health care services for tobacco-related diseases. Plaintiffs claim for nuisance fails because plaintiffs cannot demonstrate proximate cause. *Northwest Laborers*, 58 F. Supp. 2d at 1215.

6. Conspiracy

Finally, plaintiffs' conspiracy claim fails because there are no underlying illegal acts. In Washington, a

---

[2]The *Fison* decision does not require a contrary result. In *Fison*, a physician whose reputation was injured had standing to sue a drug company for unfair and deceptive practices by failing to warn the physician of known dangers of its drug. In *Fison*, the Court relied on the unique relationship between drug company and physician. Plaintiffs have no similar relationship with the defendants.

civil conspiracy claim must be based on underlying "actionable wrongs," "overt acts," or a "tort working damage to the plaintiffs." *Northwest Laborers,* 58 F. Supp. 2d at 1216, *citing W.G. Platts, Inc. v. Platts,* 73 Wn. 2d 434, 438-40, 438 P.2d 867 (1968). A conspiracy claim fails if the underlying act or claim is not actionable. *See id.*; *Wilson v. State,* 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

E. Conclusion

The injuries alleged in this litigation may be recovered by the persons who were directly harmed by defendants' conduct. Plaintiffs' claims are derivative of the claims of smokers and, under long-standing judicial precedent, cannot be allowed to proceed.

IT IS SO ORDERED.

DATED this 13th day of December, 1999.

/s/ Thomas S. Zilly
THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association; ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; AFFILIATED HEALTH SERVICES, a general partnership of Skagit County Public Hospital District No. 1 and Skagit & Whatcom Counties Public Hospital District No. 304; CHELAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; DOUGLAS, GRANT, LINCOLN, OKANOGAN COUNTIES PUBLIC HOSPITAL DISTRICT NO. 6; FERRY COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, GARFIELD COUNTY PUBLIC HOSPITAL DISTRICT; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; GRAYS HARBOR COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; KENNEWICK PUBLIC HOSPITAL DISTRICT; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1;

No. 00-35117
D.C. No.
CV-98-01675-TSZ
OPINION

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; KITTITAS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; LEWIS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; MASON COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; OKANOGAN AND DOUGLAS COUNTIES PUBLIC HOSPITAL DISTRICT NO. 1; OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 4; PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; PEND OREILLE COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; PROSSER PUBLIC HOSPITAL DISTRICT; SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; SKAGIT AND WHATCOM COUNTIES PUBLIC HOSPITAL DISTRICT NO. 304; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 1-A; WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 3,

Plaintiffs-Appellants,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTEMENTS LIMITED, formerly known as British-American Tobacco Company Limited; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.; UNKNOWN CORPORATIONS A-Z,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
December 14, 2000—San Francisco, California

Filed February 22, 2001

Before: Robert Boochever, Diarmuid F. O'Scannlain, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Michael K. Vaska (argued), Bradley J. Berg, Steven G. Jones, and Chryssa V. Deliganis, Foster Pepper & Shefelman PLLC, Seattle, Washington, for the plaintiffs-appellants.

Herbert M. Wachtell (argued), Wachtell, Lipton, Rosen & Katz, New York, New York, and John W. Phillips, Leonard J. Feldman, and Judith H. Ramseyer, Heller Ehrman White & McAuliffe LLP, Seattle, Washington, for defendant-appellee Philip Morris Incorporated; Bradley S. Keller, Byrnes & Keller, LLP, Seattle, Washington, and H. Joseph Escher, III and Peter J. Busch, Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco, California, for defendant-appellee R.J. Reynolds Tobacco; John A. Tondini, Byrnes & Keller, LLP, Seattle, Washington, and Jeffrey Davidson and Tony L. Richardson, Kirkland & Ellis, Los Angeles, California, for defendant-appellee Brown & Williamson Tobacco Corp.; Christopher W. Tompkins, Betts Patterson & Mines, P.S., Seattle, Washington, and Jeffrey S. Nelson and Tina M. Schaefer, Shook, Hardy & Bacon L.L.P., Kansas City, Missouri, for defendant-appellee Lorillard Tobacco Company; Thomas R. Merrick, Bullivant, Houser, Pendergrass & Hoffman, Seattle, Washington, for defendant-appellee British-American Tobacco Co., Ltd.; Delber D. Miller and Heidi Bateman, Miller Bateman LLP, Seattle, Washington, for defendant-appellee United States Tobacco Company; John D. Wilson and David M. Jacobi, Wilson Smith Cochran & Dickerson, Seattle, Washington, for defendant-appellee Smokeless Tobacco Council, Inc.; James R. Murray and Franklin D. Cordell, Gordon Murray Tilden, Seattle, Washington, for defendant-appellee The Tobacco Institute, Inc.; James H. Jordan, Jr., Miller, Nash, Wiener, Hager & Carlsen, Seattle, Washington, for defendant-appellee The Council for Tobacco Research - U.S.A., Inc.; Thomas J. Brewer and Steven T. Seward, Wickwire, Green, Crosby, Brewer & Seward, Seattle, Washington, for defendant-appellee Hill & Knowlton, Inc.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether public hospital districts may bring federal and state claims against tobacco firms to recover their

unreimbursed costs for treating patients suffering from tobacco-related illnesses.

I

The Association of Washington Public Hospital Districts, along with the Association's individual member districts (collectively, "Hospital Districts"), appeal from the district court's dismissal of their federal antitrust, Racketeer Influenced and Corrupt Organizations Act ("RICO"), and supplemental state law claims against a number of tobacco companies and tobacco industry organizations (collectively, "Tobacco Firms"). The Hospital Districts are political subdivisions of the State of Washington which are required by state and federal law to provide health care services to the general public regardless of their patients' ability to pay.

The Hospital Districts allege that the Tobacco Firms have engaged in a half-century conspiracy against the public generally and the health care industry in particular. According to the Hospital Districts, the Tobacco Firms have conspired to misrepresent and to conceal the addictive nature of nicotine and the health risks associated with tobacco use, promoting their alleged deception through propaganda disguised as independent scientific research while endeavoring to suppress legitimate scientific research that demonstrates the dangers of tobacco use. The Hospital Districts further claim that the Tobacco Firms have conspired to suppress competition to develop less harmful nicotine and tobacco products and have manipulated the levels of nicotine in their products to ensure continuing addiction. Finally, the Tobacco Firms have allegedly conspired to refrain from making any claims concerning the relative health superiority of specific tobacco products.

According to the Hospital Districts, the Tobacco Firms' unlawful conduct has caused them considerable financial harm. But for the Tobacco Firms' conspiracy to suppress competition, they allege, less harmful tobacco products would

have been developed which would have garnered a substantial market share. The Hospital Districts maintain that they themselves were potential consumers of such products, as they could have purchased them for the use and treatment of their patients suffering from nicotine addiction. Patients who used these less harmful products presumably would have experienced fewer tobacco-related health illnesses, thereby reducing the Hospital Districts' costs for treating such illnesses. Further, the Tobacco Firms' alleged conspiracy to spread misinformation regarding the adverse health effects of tobacco use, the addictive nature of nicotine, and the Tobacco Firms' own manipulation of nicotine levels allegedly prevented the Hospital Districts from instituting more effective smoking cessation programs. Such misinformation also induced the Hospital Districts' patients to use tobacco products. Thus, but for the Tobacco Firms' alleged conspiracy to deceive the public, the Hospital Districts could have assisted more patients to overcome their addiction to nicotine products, again reducing their costs for treating tobacco-related illnesses.

The Hospital Districts commenced this action against the Tobacco Firms to recover their increased costs for treating their patients' tobacco-related illnesses caused by the Tobacco Firms' unlawful conduct, alleging federal antitrust and RICO violations; state common law claims for fraudulent misrepresentation, fraudulent concealment, breach of special duty, unjust enrichment, civil conspiracy, and public nuisance; and violations of the Washington Unfair Business Practices Act—Consumer Protection Act, Wash. Rev. Code Ann. §§ 19.86.020-030. In a carefully reasoned decision, the district court dismissed all claims with prejudice for failure to state a claim, relying on *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999). The court held that the Hospital Districts did not have antitrust or RICO standing because their claimed damages were not proximately caused by the Tobacco Firms' unlawful conduct, but were instead derivative of the personal injuries of smokers afflicted by tobacco-related illnesses.

Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 79 F. Supp. 2d 1219, 1224 (W.D. Wash. 1999). The court also held that the Hospital Districts' antitrust claims were barred for lack of antitrust injury under *Am. Ad Mgmt Inc. v. GTE of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 2000), because the Hospital Districts did not experience their injuries in the market where competition was being restrained. *Ass'n of Wash. Pub. Hosp. Dists.*, 79 F. Supp. 2d at 1226. Finally, the district court dismissed the Hospital Districts' state common law claims for lack of proximate cause, *id.* at 1228-29, and dismissed their Consumer Protection Act claims under *Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 858 P.2d 1054, 1060-61 (Wash. 1993), for failure to allege an injury to "business or property," *Ass'n of Wash. Pub. Hosp. Dists.*, 79 F. Supp. 2d at 1229. This appeal followed.

II

We must first decide whether the district court erred in dismissing the Hospital Districts' federal antitrust and RICO claims.

A

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a private damages suit. 15 U.S.C. § 15. Similarly, 18 U.S.C. § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962," the substantive provisions of RICO, may bring a private damages suit. 18 U.S.C. § 1964(c). Nonetheless, the courts have recognized that private antitrust and RICO actions are subject to traditional "judicial tools to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Among these limitations is the requirement that the alleged violations of the law be the "proximate cause" of the injury suffered. *Id.*

(RICO); *Blue Shield v. McCready*, 457 U.S. 465, 477 (1982) (antitrust).

A direct relationship between the injury and the alleged wrongdoing has been one of the "central elements" of the proximate causation determination, and "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [ ] generally [has been] said to stand at too remote a distance to recover." *Oregon Laborers*, 185 F.3d at 963 (quoting *Holmes*, 503 U.S. at 268-69 (internal citations omitted)). To determine whether an injury is "too remote" to allow recovery under both the antitrust laws and RICO, a three-factor test is applied: "(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Id.* (citing *Holmes*, 503 U.S. at 269-70, and *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 545 (1983)).

In *Oregon Laborers*, we considered the antitrust and RICO proximate cause requirement in the tobacco litigation context. There, five union health and welfare trust funds that provide health care benefits to their beneficiaries brought suit against various tobacco firms, alleging federal antitrust and RICO violations as well as state common law and statutory claims. The trusts' complaint was predicated on the same conspiracy allegations as are at issue here. *Id.* at 961. Like the Hospital Districts, the trusts sought to recover their increased expenditures for treatment of their beneficiaries' tobacco-related illnesses that allegedly resulted from the tobacco defendants' wrongdoing. *Id.* at 962.

We held that the trusts' claims failed as a matter of law. We explained that the trusts lacked both antitrust and RICO stand-

ing, as they could not establish that their injuries were proximately caused by the tobacco defendants' wrongdoing. *Id.* at 963-66. We observed that the trusts' injuries were entirely derivative in nature, for "without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." *Id.* at 963. Thus, there was no "direct link" between the defendants' alleged wrongdoing and the trusts' damages, and the proximate cause requirement was not met. *Id.* at 964.

We then applied the three-factor *AGC/Holmes* proximate cause test. We held that the first factor weighed against the trusts because there existed more directly injured victims, in the form of the smokers themselves, who would be motivated to punish the defendants for their wrongdoing. *Id.* We recognized that such directly injured victims could *not* bring suit under RICO or the antitrust laws, given that they suffered personal injuries rather than the requisite "injury to business or property." *Id.* Nonetheless, we rejected the trusts' argument that this weighed in favor of standing. Although smokers could not vindicate the public interest in antitrust enforcement, they could bring other claims to deter the defendants' wrongdoing. *Id.* Next, we observed that the trusts' damages were entirely speculative in nature, as they would involve proof, ultimately, of how smokers themselves would have changed their behavior in the absence of the defendants' wrongdoing. *Id.* at 965. We remarked that "[t]he difficulty of ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions." *Id.* Finally, we noted that there was the potential for duplicative recovery given the possibility that smokers might bring suit against the defendants for their personal injuries under state law theories. *Id.* at 966.

B

All other Courts of Appeals that have addressed the issue have agreed that union trust funds lack standing to bring antitrust and RICO claims against the tobacco industry to recover their increased expenditures for treating tobacco-related illnesses.[1] The fact that the Hospital Districts are health care *providers* rather than third party health care payers like the union trusts in *Oregon Laborers* is immaterial for purposes of RICO and antitrust standing. The *ratio decidendi* of *Oregon Laborers* and the union health trust cases from our sister circuits is fatal to the Hospital Districts' claims.

Like the union trust funds in *Oregon Laborers*, the Hospital Districts are attempting to recover damages that are derivative of the injuries suffered by smokers. The district court properly noted that "[w]ithout any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." *Ass'n of Wash. Pub. Hosp. Districts*, 79 F. Supp. 2d at 1224. Thus, there is no *direct* link between the alleged misconduct of the Tobacco Firms and the Hospital Districts' claimed damages.

As we did in *Oregon Laborers*, the district court examined the Hospital Districts' claims according to the proximate cause factors set forth in *AGC* and *Holmes*: the directness of the injury, the speculative nature of the harm, and the risk of duplicative recovery and complexity of apportioning damages. *Id.* at 1224-25. The court correctly concluded that each of these factors weighs strongly against according the Hospital Districts antitrust and RICO standing. *Id.* at 1224-26,

---

[1] *See United Food & Commercial Workers v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Int'l Bhd. of Teamsters v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *Laborers Local 17 v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999).

1227. Smokers are the "more direct victims" who can vindicate the public interest in deterring the Tobacco Firms' wrongful conduct. *See Oregon Laborers*, 185 F.3d at 964. The difficulty of ascertaining the Hospital Districts' damages attributable to such wrongful conduct is just as great here as it was in *Oregon Laborers*. Calculation of the Hospital Districts' damages would entail considerable speculation regarding how individuals' tobacco usage would have changed in the event that accurate information and less harmful tobacco products were available. *See id.* at 965. Finally, the same potential for duplicative recovery is present given the possibility that smokers themselves could bring state law claims against the Tobacco Firms to recover for their personal injuries.[2] *See id.* at 966.

C

The Hospital Districts offer several possible bases on which to distinguish *Oregon Laborers*. The common theme underlying the Hospital Districts' contentions is that looser RICO and antitrust standing rules apply to health providers due to their special relationship with their patients, a relationship that third party payers such as union health trusts lack.[3] The differ-

---

[2]The Hospital Districts contend that the risk of duplicative recovery here is greatly reduced because, under the terms of the Master Settlement Agreement between certain states, including Washington, and the tobacco industry, any recovery by the Hospital Districts would be offset by a corresponding reduction in Washington's award under the Master Settlement Agreement. Assuming, arguendo, that this is accurate, it has no bearing on the possibility of duplicative recovery in the event that individual *smokers* who have been patients of the Hospital Districts bring suit against the Tobacco Firms. In fact, it was the possibility of claims by injured smokers, rather than state governments, that led us in *Oregon Laborers* to hold that the second *AGC/Holmes* factor weighed in favor of the tobacco defendants. *Oregon Laborers*, 185 F.3d at 966.

[3]The Hospital Districts also submit that they should have standing because, as political subdivisions of the state, they are possessed of certain attributes of sovereignty. Nevertheless, they do not, and in fact could not,

ences between health care providers and third party payers, however, do nothing to remedy the fundamental defect with the Hospital Districts' claims: they are attempting to recover for harm that is derivative of personal injuries visited upon their patients. Their claims are just as remote, and would occasion the same unfounded speculation concerning damages, as the union trusts' claims in *Oregon Laborers*. Thus, the Hospital Districts' attempts to distinguish *Oregon Laborers* are unavailing.

The Hospital Districts cite *McCready*, 457 U.S. 465, as establishing a special rule of antitrust standing for health care providers. The Hospital Districts are incorrect. In *McCready*, a group health plan subscriber brought an antitrust suit against the plan, alleging that it conspired with psychiatrists to restrain competition in the psychotherapy market. *Id.* at 467. The plan reimbursed its subscribers for psychotherapy treatment provided by psychiatrists, but not psychologists. The plaintiff received unreimbursed treatment from a psychologist. *Id.* While recognizing that the conspiracy was targeted at psychologists rather than plan subscribers, the Court nevertheless held that the plaintiff had antitrust standing, explaining that "[d]enying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends." *Id.* at 479. The Court further explained that the plaintiff's injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists . . . ." *Id.* at 484.

McCready does not establish a special standing rule for health care providers, as the Hospital Districts would read it,

---

insist that any such quasi-sovereign status exempts them from the proximate cause requirement. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 436 (3d Cir. 2000) (public hospitals cannot invoke quasi-governmental standing to sue tobacco companies on behalf of their non-paying patients without regard to proximate cause).

nor does it dispense with the general requirement that antitrust and RICO plaintiffs must be directly harmed by the defendant's wrongful conduct. As the Court subsequently explained in *AGC*, in *McCready* "the actual plaintiff was directly harmed by the defendants' unlawful conduct." *AGC*, 459 U.S. at 529 n.19. She was denied reimbursement for her psychotherapy expenses. Her damages were not derivative of the harm the conspirators inflicted upon psychologists. In fact, the Court noted that McCready's psychologist was fully paid for his services and was in no way injured by Blue Shield's refusal to reimburse McCready for the cost of such services. *McCready*, 457 U.S. at 475. Neither *McCready* nor any of the other cases cited by the Hospital Districts provides any support for the Hospital Districts' attempt to recover for their remote harm.[4]

Similarly, the fact that the Hospital Districts allege that they were potential purchasers of less harmful tobacco and nicotine delivery products does not render their claims any less remote. The harm suffered by the Hospital Districts as potential purchasers of products whose development the Tobacco Firms allegedly conspired to suppress is derivative of the harm suffered by their patients, who were the potential *users* of such products. Had such less harmful products been available, the Hospital Districts' patients might have used them, and in turn might have suffered from fewer tobacco-related diseases, with the result that the Hospital Districts might have incurred lower tobacco-related treatment costs. This is the very essence of a derivative injury.

---

[4]The Hospital Districts cite several other cases which purportedly recognize a special standing rule for health care providers. However, these cases concern constitutional standing, not RICO or antitrust standing. *See NOW v. Scheidler*, 510 U.S. 249, 255-56 (1994); *Singleton v. Wulff*, 428 U.S. 106, 113-18 (1976); *Lee v. Oregon*, 869 F. Supp. 1491, 1493-95 (D. Or. 1994), vacated on other grounds by 107 F.3d 1382 (9th Cir. 1997). Thus, they are inapposite.

D

The Hospital Districts' antitrust claims fail on a second, independent ground: failure to allege an antitrust injury. An "antitrust injury" is an injury of "the type that the antitrust statute was intended to forestall." *AGC*, 459 U.S. at 540. "The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). Further, "[a]ntitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057.

Although the Hospital Districts allege that they are potential participants in the nicotine delivery market, and this is the market where competition allegedly has been restrained, the district court ruled that they nonetheless failed to state an antitrust injury. The court reasoned that the Hospital Districts' *injuries* were not experienced in the nicotine delivery market, but rather in the health care market. We agree. The essence of the Hospital Districts' allegations is that the Tobacco Firms' conspiracy to suppress the development of less harmful tobacco products indirectly resulted in the Districts' incurring increased health care expenses. These expenses simply cannot be characterized as injuries that the Hospital Districts experienced in the nicotine delivery market. *See Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 83 F. Supp. 2d 70, 90 (D.D.C. 1999) (holding that plaintiff union health trusts did not suffer an antitrust injury, notwithstanding their claim to be potential purchasers of nicotine replacement products, because their asserted "infrastructure damages" "are not the type that would result from anticompetitive activity in the nicotine products market . . . .").

Accordingly, the district court properly dismissed the Hospital Districts' federal RICO and antitrust claims.[5]

III

We must next decide whether the district court properly dismissed the Hospital Districts' state law claims.

A

The Hospital Districts brought suit against the Tobacco Firms under the Washington Consumer Protection Act ("CPA"), Wash. Rev. Code Ann. §§ 19.86.020[6] and 19.86.030.[7] The CPA provides a cause of action to "[a]ny person who is injured in his or her business or property by a violation of" the substantive provisions of the CPA. Wash. Rev. Code Ann. § 19.86.090; *Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 858 P.2d 1054, 1060 (Wash. 1993). Expenses for personal injuries are not injuries to business or property under the CPA. *Id.* at 1064.

The district court held that the Hospital Districts failed to meet such "business or property" requirement because their claimed injuries were predicated on personal injuries to smokers. *Ass'n of Wash. Pub. Hosp. Dists.*, 79 F. Supp. 2d at 1229. The district court observed that smokers themselves could not recover their own smoking-related medical expenses under the CPA; accordingly, the mere fact that a third party pays for

---

[5]We note, finally, that while the Hospital Districts, unlike the union trusts, apparently cannot avail themselves of a contract-based subrogation right to bring suit against the Tobacco Firms, this is irrelevant to the question of whether their antitrust and RICO claims fail for remoteness.

[6]Wash. Rev. Code Ann. § 19.86.020 provides, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

[7]Wash. Rev. Code Ann. § provides, "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

their medical treatment should not transform such medical expenses into business or property harm recoverable under the CPA. *Id.*

We came to the same conclusion in *Oregon Laborers*, where we held that union trusts could not recover their expenses incurred to treat tobacco-related illnesses under Oregon's Unfair Trade Practices Act ("UTPA"), Or. Rev. Stat. § 646.638(1). Like the Washington CPA, "any person who suffers any ascertainable loss of money or property, real or personal, as a result" of the substantive provisions of the UTPA has standing to bring suit under the Oregon statute. Or. Rev. Stat. § 646.638(1). Again like the Washington CPA, the Oregon UTPA does not permit recovery for personal injuries. *Gross-Haentjens v. Leckenby*, 589 P.2d 1209, 1210-11 (Or. Ct. App. 1979) ("[W]e hold that ORS 646.638 of the Oregon Unlawful Trade Practices Act was not intended by the legislature to create such a new cause of action for personal injuries."). In rejecting the union trusts' claims under the UTPA, we observed that "[p]laintiffs' damages—expenses to treat smokers' personal injuries—are clearly predicated upon 'personal injury' and are therefore unrecoverable under the UPTA." *Oregon Laborers*, 185 F.3d at 968.[8]

In light of the similarity between the Washington and Oregon consumer protection statutes, we hold that *Oregon Laborers* bars the Hospital Districts' CPA claim to recover for their unreimbursed expenses treating their patients' smoking-related illnesses.

---

[8]Nor does *Fisons Corp.* require a different result. In *Fisons Corp.*, the Supreme Court of Washington held that a physician could recover under the Washington Consumer Protection Act for damages he suffered resulting from a drug manufacturer's failure to warn him of the known dangers of a drug he prescribed to a patient. *Fisons Corp.*, 858 P.2d at 1061. The physician in *Fisons Corp.* did not seek to recover for his expenses incurred in treating the patient who was harmed by the drug, but rather sought to recover for the injury to his reputation occasioned by the misprescription. *Id.* at 1061, 1063. *Fisons Corp.* thus provides no support for the Hospital Districts.

The Hospital Districts' CPA claim fails as a matter of law for the additional reason that, as discussed above, the Tobacco Firms' unlawful conduct was not the proximate cause of the Hospital Districts' injuries. Proximate cause is an element of a claim under the CPA. *Fisons Corp.*, 858 P.2d at 1062. The Washington courts are directed to interpret the CPA in light of federal court decisions interpreting federal antitrust law. Wash. Rev. Code Ann. § 19.86.920; *Fisons Corp.*, 858 P.2d at 1064. Further, "any departure from federal law . . . must be for a reason rooted in [Washington] statutes or case law and not in general policy arguments that th[e] court would weigh if the issue came before [it] as matter of first impression." *Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997), review denied, 950 P.2d 475 (Wash. 1998). The Hospital Districts have failed to point to any reason "rooted in state statutes or case law" that would support our departure from federal antitrust proximate cause principles when analyzing the proximate cause requirement under the CPA.

Accordingly, we affirm the district court's dismissal of the Hospital Districts' CPA claim.

B

Finally, we must consider whether the district court properly dismissed the Hospital Districts' Washington state common law claims. Only the Hospital Districts' fraudulent concealment, fraudulent misrepresentation, and nuisance claims are before us.[9] Proximate cause is an element of each of these claims under Washington law. *Amtruck Factors, Div. of Truck Sales, Inc. v. Int'l Forest Prods.*, 795 P.2d 742, 746 (Wash. Ct. App. 1990) (observing that proximate cause is an essential element of a fraud claim under Washington law);

[9]The Hospital Districts have failed to brief the district court's dismissal of their unjust enrichment, breach of special duty, and conspiracy claims. These claims are thus waived.

DeYoung v. Cenex Ltd., 1 P.3d 587, 590 (Wash. Ct. App. 2000) (recognizing that proximate cause is an element of a nuisance claim). Washington courts have defined proximate cause in a manner consistent with the common law "directness" requirement, as a cause "which, *in a direct sequence unbroken by any new independent cause*, produces the injury complained of, and without which such injury would not have happened." *Fisher v. Parkview Props., Inc.*, 859 P.2d 77, 82 (Wash. Ct. App. 1993) (citing *Alger v. Mukilteo*, 730 P.2d 1333, 1336 (Wash. 1987); *Hartley v. State*, 698 P.2d 77, 83 (Wash. 1985)) (emphasis added).

The Hospital Districts' common law claims thus fail for the same reasons that their federal antitrust and RICO claims failed: the Tobacco Firms' unlawful conduct was not the proximate cause of their injuries. The proximate cause test for federal antitrust and RICO standing is the common law proximate cause test. *AGC*, 459 U.S. at 531; *Holmes*, 503 U.S. at 268-69; *Laborers Local 17 v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999) ("To determine in a given case whether proximate cause is present [for purposes of RICO claims], common law principles are applied."). Accordingly, the district court correctly dismissed the Hospital Districts' fraudulent concealment, fraudulent misrepresentation and nuisance claims. *Oregon Laborers*, 185 F.3d at 968 ("[F]or the same reasons that proximate cause did not exist for plaintiffs' RICO and antitrust claims, proximate cause is lacking for their fraud claim"). *See also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 934-35 (3d Cir. 1999) ("The same principles that lead us to conclude that plaintiffs' antitrust and RICO claims were properly dismissed lead to the inevitable conclusion that their state law claims must also fail . . . . Just as we have found the link between defendants' alleged fraud—providing false information regarding the safety of their products—and plaintiffs' alleged injuries too attenuated to support a RICO claim, we also find the link too remote to support a common-law fraud claim."); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429,

445-46 (3d Cir. 2000) (dismissing state claims based on the "same principles that lead us to conclude that plaintiffs' antitrust and RICO claims were properly dismissed": lack of proximate cause).

IV

For the foregoing reasons, the judgment of the district court is

AFFIRMED.[10]

[10]Defendants-Appellees' Motion to File Appendix of Unpublished Opinions is DENIED.

Supreme Court, U.S.
FILED
3
01 121 JUL 16 2001
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTMENTS LIMITED, formerly known as BRITISH AMERICAN TOBACCO COMPANY LIMITED; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE RESEARCH-USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.; UNKNOWN CORPORATIONS A-Z,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

FOSTER PEPPER & SHEFELMAN
1111 Third Avenue, Suite 3400
Seattle, Washington 98101
(206) 447-4400

CAMDEN M. HALL
(Counsel of Record)

[Counsel listed inside front cover]

Washington, D.C. • THIEL PRESS • (202) 328-3288

6 IV

MICHAEL K. VASKA
CAMDEN M. HALL
(Counsel of Record)
BRADLEY BERG
ROBERT I. EATON
FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Telecopier: (206) 447-9700

Attorneys for Petitioners,
Association of Washington
Public Hospital Districts

TABLE OF CONTENTS

APPENDIX D – Order Denying Rehearing of the United States Court of Appeals for the Ninth Circuit (April 16, 2001) 188a

APPENDIX D

[Filed APR 16 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35117

DC No. CV-98-01675-TSZ

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, a Washington unincorporated association; ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; AFFILIATED HEALTH SERVICES, a general partnership of Skagit County Public Hospital District No. 1 and Skagit and Whatcom Counties Public Hospital District No. 304; CHELAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; CLALLAM COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; DOUGLAS, GRANT, LINCOLN, OKANOGAN COUNTIES PUBLIC HOSPITAL DISTRICT NO. 6; FERRY COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; GARFIELD COUNTY PUBLIC HOSPITAL DISTRICT; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; GRAYS HARBOR COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; KENNEWICK PUBLIC HOSPITAL DISTRICT; KING COUNTY PUB-

LIC HOSPITAL DISTRICT NO. 1; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; KITTITAS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; LEWIS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; MASON COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; OKANOGAN AND DOUGLAS COUNTIES PUBLIC HOSPITAL DISTRICT NO. 1; OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; OKANOGAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 4; PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; PACIFIC COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; PEND OREILLE COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; PROSSER PUBLIC HOSPITAL DISTRICT; SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; SKAGIT COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; SKAGIT AND WHATCOM COUNTIES PUBLIC HOSPITAL DISTRICT NO. 304; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 1; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 2; SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 3; WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 1-A; WHITMAN COUNTY PUBLIC HOSPITAL DISTRICT NO. 3;

Plaintiffs-Appellants,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO PLC; B.A.T. INDUSTRIES PLC; BRITISH AMERICAN TOBACCO INVESTEMENTS LIMITED, formerly known as British-American Tobacco Company

Limited; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH-USA, INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON INC.; UNKNOWN CORPORATIONS A-Z,

Defendants-Appellees.

ORDER

Before: BOOCHEVER, O'SCANNLAIN, and TASHIMA, Circuit Judges.

The panel has voted unanimously to deny the appellants' petition for rehearing. Judges O'Scannlain and Tashima have voted to deny the appellants' petition for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
AUG 20 2001
CLERK

No. 01-121

IN THE

Supreme Court of the United States

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, ET AL.,

Petitioners,

—v.—

PHILIP MORRIS INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

John W. Phillips
Leonard J. Feldman
Judith H. Ramseyer
HELLER EHRMAN WHITE
& MCAULIFFE LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104
(206) 447-0900

Herbert M. Wachtell
Counsel of Record
Peter C. Hein
Michael A. Charish
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Respondent Philip Morris Incorporated

(*Counsel for other Respondents listed on reverse side of cover*)

August 20, 2001

HOPP

Bradley S. Keller
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

H. Joseph Escher, III
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, California 94111

Attorneys for Respondent
R.J. Reynolds Tobacco

John A. Tondini
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Jeffrey Davidson
Tony L. Richardson
KIRKLAND & ELLIS
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Respondent
Brown & Williamson Tobacco Corp.

Christopher W. Tompkins
BETTS PATTERSON & MINES, P.S.
1215 Fourth Avenue, Suite 800
Seattle, Washington 98161

David W. Smith
Tina M. Schaefer
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Respondent
Lorillard Tobacco Company

Jay R. Henneberry
Susan St. Denis
CHADBOURNE & PARKE LLP
350 South Grand Avenue, Suite 3300
Los Angeles, California 90071

Thomas R. Merrick
BULLIVANT HOUSER BAILEY PC
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Attorneys for Respondent
British American Tobacco
(Investments) Limited

Peter J. McKenna
Eric S. Sarner
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036

Attorneys for Respondent
U.S. Smokeless Tobacco Company

John D. Wilson
David M. Jacobi
WILSON SMITH COCHRAN
& DICKERSON
1215 Fourth Avenue, #1700
Seattle, Washington 98161-1007

Attorneys for Respondent
Smokeless Tobacco Council, Inc.

James R. Murray
Franklin D. Cordell
GORDON MURRAY TILDEN
1325 Fourth Avenue, #1800
Seattle, Washington 98101

Attorneys for Respondent
The Tobacco Institute, Inc.

Bruce G. Merritt
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, New York 10022

Attorneys for Respondent
The Council for Tobacco
Research U.S.A., Inc.

Thomas J. Brewer
The Exchange Building, Suite 2000
821 Second Avenue
Seattle, Washington 98104

Attorney for Respondent
Hill and Knowlton, Inc.

QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the fundamental legal defect in Petitioners' claims:

> Did the Court of Appeals correctly hold (in accord with its prior precedent and that of the other Courts of Appeals) that the Petitioner hospitals districts' RICO and federal antitrust claims were barred because the Petitioners' alleged injury — incurring costs to treat smoking-related personal injuries suffered by their individual patients — was derivative of the personal injuries of the patients, and thus too remote and indirect as a matter of law to permit recovery in an action brought by the Petitioners in their own right?

Petitioners' claims also suffer from multiple additional defects that would provide independent grounds for affirming the decision of the Court of Appeals. *See* pp. 19-20, *infra*.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporation:

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent British American Tobacco (Investments) Limited ("BATCo") (f/k/a British-American Tobacco Company Limited) has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
B.A.T. Industries p.l.c.
British American Tobacco (Holdings) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATCo's stock.

Respondent Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent U.S. Smokeless Tobacco Company (formerly United States Tobacco Company) has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of U.S. Smokeless Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") does not have any parent corporations and there is no publicly held company that owns 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. ("TI") does not have any parent corporations and there is no publicly held company that owns 10% or more of TI's stock.

Respondent Hill and Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPPIH 2001, Inc.
Cygnet Holdings, Inc.
Young & Rubicam, Inc.
York Merger Corp.
WPP Luxembourg Gamma SARL
WPP Luxembourg Beta SARL
WPP Luxembourg SARL

WPP North Atlantic Limited
WPP Group plc

WPP Group plc is the only publicly held company that owns 10% or more of Hill and Knowlton, Inc.'s stock.

Respondent Smokeless Tobacco Council, Inc. ("STC") has no parent corporations. There are no publicly held companies that own 10% or more of STC's stock.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.	4
II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.	6
A. This Court's decisions mandate the dismissal of Petitioners' remote claims.	6
B. Petitioners mischaracterize the decision below and decisions of this Court in an effort to manufacture a conflict	10
1. The Ninth Circuit did not announce a test that conflicts with this Court's decisions	10

PAGE

2. This Court's standing analysis does *not* assume the existence of a "proper plaintiff" for every antitrust or RICO violation 14

III. THE RICO AND ANTITRUST STANDING ISSUES HAVE *NOT* "DIVIDED COURTS THROUGHOUT THE COUNTRY." 16

IV. INDEPENDENT GROUNDS WOULD JUSTIFY AFFIRMING THE DECISION BELOW. 19

V. CERTIORARI IS INAPPROPRIATE IN ANY EVENT AS TO PETITIONERS' STATE-LAW CLAIMS. 21

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: PAGE

Acoma Pueblo v. *American Tobacco Co.*, No. CIV 99-1049M/WWD, slip op. (D.N.M. July 30, 2001) ..... 16n.*

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) ..... 18n.*

Allegheny Gen. Hosp. v. *Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000) 4, 9, 10, 18n.**, 20

Allgood v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996) ..... 20n.*

Anthony v. *Slaid*, 52 Mass. 290 (Mass. 1846) 7

Arkansas Blue Cross and Blue Shield v. *Philip Morris, Inc.*, 47 F. Supp. 2d 936 (1999 U.S. Dist. LEXIS 4573) (N.D. Ill. 1999), *rev'd*, *International Bhd. of Teamsters* v. *Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999) 17

Arkansas Carpenters' Health & Welfare Fund v. *Philip Morris, Inc.*, 75 F. Supp. 2d 936 (E.D. Ark. 1999) ..... 16n.*

Associated Gen. Contractors of Cal. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 7, 8n.*, 9, 12, 13n.**, 14, 15, 20

Blue Cross & Blue Shield of N.J. v. *Philip Morris, Inc.*, 36 F. Supp. 2d 560 (E.D.N.Y. 1999) ..... 18n.**

PAGE

Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 20

Blue Cross & Blue Shield United of Wisc. v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995) 18

California v. *ARC America Corp.*, 490 U.S. 93 (1989) ..... 15n.*

Contractors, Laborers, Teamster & Eng'rs Health & Welfare Plan v. *Philip Morris*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999) ..... 16n.*

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ..... 20n.*

Florida v. *American Tobacco*, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996) 18

Hanover Shoe Inc. v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968) 15

Hawaii Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 52 F. Supp. 2d 1196 (D. Haw. 1999) ..... 16n.*

Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) ..... 6, 7, 8 & n.*, 9, 10, 11, 12 & n.*, 13 & n.**

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) ..... 15 & n.*

PAGE

International Bhd. of Teamsters v. *Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999) ..... 4, 5, 12n.*, 15, 17, 18 & n.**, 20 & n.*

Iron Workers Local Union No. 17 Ins. Fund v. *Philip Morris, Inc.*, 23 F. Supp. 2d 771 (N.D. Ohio 1998), 29 F. Supp. 2d 801 (1998), bench order (Mar. 5, 1999), order (Mar. 22, 1999) 17

Israel Travel Advisory Serv., Inc. v. *Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) ..... 12n.*

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 21

J. Truett Payne Co. v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981)..... 13n.*

Laborers' & Operating Engineers' Util. Agreement Health & Welfare Trust Fund for Ariz. v. *Philip Morris, Inc.*, 42 F. Supp. 2d 943 (D. Ariz. 1999) ..... 16n.*

Laborers Local 17 Health & Benefit Fund v. *Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000)..... 2, 4, 10n.*, 12, 13, & n.**, 16, 17n.*, 18n.**, 19

Lyons v. *Philip Morris, Inc.*, 225 F.3d 909 (8th Cir. 2000)..... 5

PAGE

Metro-North Commuter R.R. v. *Buckley*, 521 U.S. 424 (1997) 19

Minnesota v. *Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996) 18

Mobile Life Ins. Co. v. *Brame*, 95 U.S. 754 (1877)..... 6, 7

NOW v. *Scheidler*, 510 U.S. 249 (1994)..... 11

Oregon Laborers-Employers Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) 1, 2, 5, 12, 19, 20

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968)..... 8n.*

Regence Blueshield v. *Philip Morris, Inc.*, 2001 WL 205996 (9th Cir. 2001)..... 5

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 19

Rhode Island Laborers' Health & Welfare Trust Fund ex rel. Trustees v. *Philip Morris, Inc.*, 99 F. Supp. 2d 174 (D.R.I. 2000).....16n.*, 18n.**

Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 14

Seafarers Welfare Plan v. *Philip Morris*, 27 F. Supp. 2d 623 (D. Md. 1998).....16n.*, 18

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)..... 11

PAGE

Service Employees Int'l Union Health & Welfare Fund v. *Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999), *rev'd*, 249 F.3d 1068 (D.C. Cir. 2001) 17

Service Employees Int'l Union Health & Welfare Fund v. *Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001) .....5, 10n.*, 13, 15, 17 & n.*

Southeast Florida Laborers Dist. Health & Welfare Trust Fund v. *Philip Morris, Inc.*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998) ....16n.*

Standard Oil Co. of Cal. v. *United States*, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947).....10n.*

Steamfitters Local Union No. 420 Welfare Fund v. *Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).....2, 4, 19

Texas v. *American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) 17

Texas Carpenters Health Benefit Fund v. *Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) 4, 17

United Food and Commercial Workers Unions, Employers Health & Welfare Fund v. *Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000) 5

United States v. *Standard Oil Co. of Cal.*, 332 U.S. 301 (1947).....7, 10n.*

Waller v. *Florida*, 397 U.S. 387 (1970) .....10n.*, 18n.*

PAGE

Williams & Drake Co. v. *American Tobacco Co.*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998) ..... 16n.*

Statutes and Rules:

15 U.S.C. § 15 19

18 U.S.C. § 1964(c) 19

Supreme Court Rule 14.1(a) 21

Other Authorities:

Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) 19

STATEMENT OF THE CASE

This case is one of many brought by health care payors or providers against tobacco companies to recover costs associated with the treatment of *other persons'* personal injuries allegedly caused by smoking. The cases have spawned eleven decisions from the Courts of Appeals, in eight different circuits. In each of those eleven decisions, the Courts of Appeals have ruled — *unanimously*, without a single dissent — that *all* claims, federal and state, must be dismissed as a matter of law because those claims were remote, indirect, and derivative of the personal injuries of individual smokers. The Courts of Appeals also have denied rehearing and rehearing *en banc* in each of the seven cases in which plaintiffs have sought rehearing. And last year, this Court denied petitions for certiorari in the first three such cases to be decided by the Courts of Appeals.

Petitioners here are public hospital districts in the State of Washington (and their trade association) that sought recovery for unreimbursed health care costs allegedly incurred treating patients with tobacco-related illnesses. *See* App. 148a-149a, 152a, 172a-174a; *see also, e.g.*, App. 111a, 121a-122a. In 1999, the Hospital Districts filed a lawsuit in the District Court for the Western District of Washington that asserted federal RICO and antitrust claims as well as state-law claims. Defendants moved to dismiss. *See* App. 148a-149a.

While the motion to dismiss was pending, the Ninth Circuit affirmed the dismissal of a similar case, holding that the claims of plaintiff union health and welfare funds against the tobacco companies were "'too remote' from defendants' alleged wrongdoing" and therefore were barred. *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957, 964 (9th Cir. 1999). Relying on *Oregon Laborers*, the district court in this case dismissed the Hospital Districts' complaint in its entirety. *See* App. 151a.

Plaintiffs in *Oregon Laborers* petitioned this Court for certiorari, as did plaintiffs in similar health care payor suits against the tobacco companies that the Second and Third Circuits had rejected. On January 10, 2000, this Court denied all three petitions. *Oregon Laborers*, 528 U.S. 1075; *Laborers Local* v. *Philip Morris*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080; *Steamfitters* v. *Philip Morris*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105.

The Hospital Districts in this case appealed the dismissal of their complaint to the Ninth Circuit. The Ninth Circuit affirmed, adhering to its prior decision in *Oregon Laborers* and relying as well on the similar decisions of the other circuits. The Ninth Circuit held that "[l]ike the union trust funds in *Oregon Laborers*, the Hospital Districts are attempting to recover damages that are derivative of the injuries suffered by smokers" and thus their claims are legally too remote to permit recovery. *See* App. 178a-180a.

The Hospital Districts then petitioned the Ninth Circuit for rehearing and rehearing *en banc*. The panel that decided the case unanimously denied the petition for rehearing, and no judge on the Ninth Circuit requested a vote on whether to rehear the case *en banc*. Order (9th Cir. Apr. 16. 2001). The Hospital Districts now petition this Court for certiorari.

The Petition discusses at length various factual allegations of wrongdoing by defendants. *See*, *e.g.*, Pet. 4-6. But these allegations — which defendants would have contested had the case proceeded beyond a motion to dismiss — do not alter the legal bar that the Ninth Circuit correctly found dispositive.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decisions of other Courts of Appeals or this Court. Thus, review by this Court is not warranted.

In particular, as discussed below, eight Courts of Appeals (in eleven separate decisions, including the decision below) have now unanimously ruled that claims by third-party health care payors or providers against tobacco companies to recover costs incurred to treat personal injuries of individuals must be dismissed because the alleged injury to the payor or provider is remote, indirect, and derivative. In the three such cases in which plaintiffs sought certiorari, this Court denied petitions that presented essentially the same questions and advanced essentially the same arguments as the instant Petition.*

Defendants recognize that the Court is not bound by its prior denials of certiorari. However, in the time since the Court denied certiorari in those three cases in January 2000, subsequent developments have only rendered certiorari *less* appropriate. Thus, since January 2000, *seven* additional Court of Appeals decisions (including decisions from *four* additional circuits) have unanimously *agreed* with the decisions as to which certiorari was previously denied, reiterating that claims of third-party payors or providers against tobacco companies fail as a matter of law.

The conflicts asserted in the Petition are illusory, and rest on misdepictions of both the decision below and decisions of this Court. *See infra* pp. 10-16. And in the face of eleven unanimous Court of Appeals decisions against them, Petitioners rely on earlier *district court* decisions that the Courts of Appeals have *reversed* to support their contention that the questions presented (supposedly) "have divided courts throughout the country." *See* Pet. 27-28.

---

* *See supra* p. 2; *compare* Petition *with* petitions for writs of certiorari in Nos. 99-545 (*Steamfitters*), 99-642 (*Oregon Laborers*), and 99-791 (*Laborers Local*).

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

As Petitioners concede, there is no conflict among the Courts of Appeals on the questions presented. Pet. 27 ("No explicit conflict exists among the circuits."); *see also* Pet. 9 n.5. Indeed, *eight* different Courts of Appeals have considered claims by health care payors or providers — ranging from union funds to hospitals to Blue Cross insurers to foreign governments — to recover health care costs incurred to treat personal injuries allegedly caused by smoking. And all eight Courts of Appeals *unanimously* and correctly have held that such claims must be dismissed because the injury alleged is remote, indirect, and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing:

- **Second Circuit:** "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and therefore too remote as a matter of law for them to have standing to sue defendants." *Laborers Local*, 191 F.3d at 244.
- **Third Circuit:** "[D]ue to the remoteness of the Hospitals' injuries, this third-party suit ... may not proceed." *Allegheny Gen. Hosp.* v. *Philip Morris*, 228 F.3d 429, 445 (3d Cir. 2000); *see also Steamfitters*, 171 F.3d at 928 (plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part").
- **Fifth Circuit:** "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] .... " *Texas Carpenters* v. *Philip Morris*, 199 F.3d 788, 789 (5th Cir. 2000).
- **Seventh Circuit:** "The injury for which the plaintiffs seek compensation is remote indeed ...." *Int'l Bhd. of*

Teamsters v. *Philip Morris*, 196 F.3d 818, 825 (7th Cir. 1999).

- **Eighth Circuit:** "We agree with the ... other circuits that have denied antitrust and RICO standing to ERISA plans who seek to recover for this type of indirect injury." *Lyons* v. *Philip Morris*, 225 F.3d 909, 914 (8th Cir. 2000).

- **Ninth Circuit:** "[P]laintiffs' RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery." *Oregon Laborers*, 185 F.3d at 964; *see also Regence Blueshield* v. *Philip Morris*, 2001 WL 205996, at *2 (9th Cir. 2001) (unpublished disposition) (plaintiffs' "alleged damages are ... derivative of the personal injuries of smokers"); *Association of Washington Public Hosp. Dists.*, App. 169a-187a.

- **Eleventh Circuit:** "[A]ll of Plaintiff's claims, as a matter of law, are barred by the doctrine of proximate cause." *United Food and Commercial Workers Unions* v. *Philip Morris*, 223 F.3d 1271, 1273 (11th Cir. 2000).

- **District of Columbia Circuit:** Plaintiffs' "claims are too remote, contingent, derivative, and indirect to survive." *Service Employees Int'l Union* v. *Philip Morris*, 249 F.3d 1068, 1076 (D.C. Cir. 2001) (internal quotation marks omitted).

The remarkable uniformity of result in these eleven decisions from eight circuits does more than demonstrate the absence of a circuit split that might warrant this Court's review. It radically undermines Petitioners' repeated claim that the issue of third-party-payor standing is a "difficult" one that demands this Court's guidance. *See* Pet. 12-13, 30.

The issue here is not difficult. As shown in the next section, the conclusion that all eight circuits have reached is compelled by a legal principle that has been the settled law of this Court and this country for over 150 years. As set forth

in *Holmes* v. *SIPC*, 503 U.S. 258, 268-69 (1992): a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.

A. This Court's decisions mandate the dismissal of Petitioners' remote claims.

There is no conflict between the Ninth Circuit's decision below and any decision of this Court. To the contrary, as the Courts of Appeals have recognized, dismissal of payor and provider claims to recover health care costs incurred to treat smokers follows inexorably from this Court's precedents. As this Court observed in *Holmes*, a tortious act will often cause "ripples of harm" extending to various persons. 503 U.S. at 266 n.10. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims from recovering in their own right from the tortfeasor.

The rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. No fewer than four decisions of this Court articulate this "requirement" of direct injury — "one of [the] central elements" of proximate causation. *Id.* at 269.

Thus, in 1877, in *Mobile Life Ins. Co.* v. *Brame*, this Court barred a life insurer's attempt to recover directly from the murderer of its insured, reasoning: "The injury inflicted by

[the defendant murderer] was upon [the insured], against his personal rights; that it happened to injure the plaintiff [insurance company] was an incidental circumstance, a remote and indirect result .... " 95 U.S. 754, at 758-59. This Court added: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Thereafter, in *United States* v. *Standard Oil*, 332 U.S. 301, 311-16 (1947), this Court held that the federal government did not have a direct right of action under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

In two subsequent decisions, this Court expressly incorporated the settled common-law bar to recovery for remote injuries into the antitrust laws and RICO. *Associated Gen. Contractors* v. *California State Council*, 459 U.S. 519, 531-33 (1983) ("*AGC*"); *Holmes*, 503 U.S. at 268-71.

In *AGC*, this Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-33. *AGC* illustrates the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony* v. *Slaid*, 52 Mass. 290 (Mass. 1846) (Shaw, C.J.). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after the defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery. The court concluded that the *town* could not sue a tortfeasor for medical expenses resulting from an assault on a town pauper; therefore, a party that had *contracted with* the town to pay its paupers' expenses could not maintain such a suit. Notwithstanding the intentional nature of the tort, the injury to Anthony was "too remote and indirect." 52 Mass. at 291.

Thereafter, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that the Securities Investor Protection Corporation — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against insiders whose stock manipulation had caused the failure of the broker-dealers, which in turn had caused the customers' loss. While the manipulation caused cognizable harm to the broker-dealer, this Court held that "the link is *too remote* between the stock manipulation alleged and the customers' harm." *Id.* at 271 (emphasis added).*

Thus, the injury the Hospital Districts allege — incurring health care costs to treat personal injuries suffered by patients allegedly injured by smoking (*see supra*, p. 1) — falls squarely within a category of injuries that has been held to be remote, indirect, and derivative for over 150 years. As the Ninth Circuit recognized, "[w]ithout any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." App. 178a (quoting district court opinion at App. 155a). Hence, the Hospital Districts seek recovery for "harm that is derivative of personal injuries visited upon their patients,"

---

* Petitioners offer an interpretation of RICO's legislative history based on an American Bar Association comment (Pet. 16 n.9), but fail to mention that the *Holmes* Court found "*no merit* in [plaintiff's] reliance" on that same comment. *Holmes*, 503 U.S. at 270 n.15 (emphasis added). The Court stated that the plaintiff misconstrued the import of the American Bar Association comment, and that, in any event, it amounted to no more than "background noise drowned out by the statutory language." *Id.* Similarly, *Perma Life Mufflers* v. *Int'l Parts Corp.* (Pet. 16) avails Petitioners nothing. This Court held in *Perma Life Mufflers* that Congress did not intend to incorporate the common-law defense of *in pari delicto* into antitrust actions. *See* 392 U.S. 134, 138 (1968). In contrast, this Court held in *AGC* and *Holmes* that Congress *did* intend to incorporate the common-law requirement of proximate cause at issue here into antitrust and RICO actions.

and their claims are legally too remote to permit recovery. App. 180a.

Indeed, the injury the Hospital Districts allege is *even more* remote and indirect than the injuries held non-actionable in *AGC* and *Holmes*. As in *AGC* and *Holmes*, the injury Petitioners allegedly suffered (unreimbursed health care costs) is an indirect and derivative consequence of prior harm visited on *other* persons. But the plaintiffs in *AGC* and *Holmes* at least asserted an injury separate from that of the directly injured party. Not so here. Here, the Hospital Districts' alleged injury is *further* derivative of the harm visited on *other* persons because the only injury the Hospital Districts allege is the *treatment of those other persons' injuries*.

And the fact that plaintiffs here are hospitals districts, which provide health care directly to patients (*see* Pet. 24-25), does not alter the analysis. As the Ninth Circuit properly held: "The differences between health care providers and third party payers ... do nothing to remedy the fundamental defect with the Hospital Districts' claims: they are attempting to recover for harm that is derivative of personal injuries visited upon their patients." Accordingly, "[t]heir claims are just as remote" as those of third-party payors. *See* App. 179a-180a. The Third Circuit reached that same conclusion in rejecting a similar hospital suit against defendants. *See Allegheny Gen. Hosp.*, 228 F.3d at 441 ("[t]he Hospitals' injuries are still derivative of ... patients' injuries," even though they provide health care directly).

Indeed, the proximate-cause bar against derivative and remote claims makes perfect sense as applied to hospitals. As the District Court explained in its opinion below:

> [H]ospitals may not generally sue companies who have caused their patients' illnesses. Could plaintiffs sue an auto manufacturer for the unreimbursed costs of treating a patient injured as a result of a defective car?

> Could plaintiffs sue food manufacturers for the unreimbursed costs of treating persons injured as a result of food poisoning? In these hypothetical cases, plaintiffs could not show that the defendant's actions proximately caused their injuries. The same is true here.

App. 159a; *see also Allegheny*, 228 F.3d at 445.*

B. Petitioners mischaracterize the decision below and decisions of this Court in an effort to manufacture a conflict.

1. The Ninth Circuit did not announce a test that conflicts with this Court's decisions. *First*, the Ninth Circuit's holding that Petitioners' claims fail because "there is no *direct* link between the alleged misconduct of the [defendants] and the Hospital Districts' claimed damages" (App. 178a) does *not* "mark[ ] ... a deviation from this Court's analysis," as Petitioners claim. *See* Pet. 10. Rather, the Ninth Circuit correctly focused on the nature of the alleged *injury*, and its relation to the defendant's conduct. As this Court held in *Holmes*, proximate cause "demand[s]" as one of its

---

* Nor does Petitioners' status as political subdivisions exempt them from the proximate-cause bar against remote, indirect, and derivative claims. *First*, political subdivisions such as the Hospital Districts are solely creatures of their enabling statutes and are not sovereign entities. *See, e.g., Waller* v. *Florida*, 397 U.S. 387, 392 (1970) ("Political subdivisions of states — counties, cities, or whatever — never were and never have been considered as sovereign entities."). *Second*, the bar against remote, indirect, and derivative claims is a "common law rule of general application" (*see Laborers Local*, 191 F.3d at 243), which applies with equal force to sovereign entities. Indeed, in *United States* v. *Standard Oil*, this Court rejected the remote, indirect, and derivative claims of no less a sovereign than the United States government, which sought to recover in its own right from a tortfeasor the costs of health care that the government *provided* to one of its injured soldiers. *See* 332 U.S. 301, 302, 304 n.5, 311-16 (1947); 153 F.2d 958, 959, 963 n.6 (9th Cir. 1946) (making clear that the United States itself "supplied" the soldier's health care); *see also, e.g., Service Employees*, 249 F.3d at 1073, 1075 (rejecting suits against tobacco companies by Republics of Guatemala, Nicaragua, and Ukraine on remoteness grounds).

"central elements" a "*direct relation* between the *injury* asserted and the *injurious conduct* alleged." 503 U.S. at 268-69 (emphasis added).

The Ninth Circuit simply applied this principle from *Holmes* to the case at bar. It found no "direct link" between the "alleged misconduct" and the "claimed damages" because the *injury* alleged was "*derivative* of the injuries suffered by smokers ... [w]ithout any injury to smokers, [Petitioners] would not have incurred the additional expenses in paying for the medical expenses of those smokers." App. 178a (emphasis added). And in so finding, the Ninth Circuit expressly concurred with the unanimous opinions of its "sister circuits." *See id.*

The Ninth Circuit's decision does *not* conflict with this Court's decision in *NOW* v. *Scheidler*, as Petitioners contend. *See* Pet. 20-21 (citing 510 U.S. 249 (1994)). In fact, as the Ninth Circuit pointed out, *NOW* concerned "constitutional standing, not RICO or antitrust standing." App. 181a n.4. The only issue on which this Court granted certiorari in *NOW* was whether an economic motive was required for a RICO claim, and the only standing issue addressed by this Court was the "threshold" issue whether plaintiffs had jurisdictional, *i.e.*, Article III, standing — which requires only injury-in-fact and *not* the proximate cause requirement of direct injury that bars plaintiffs' claims here. 510 U.S. at 252, 255-56.

And although this Court in *Sedima* v. *Imrex*, 473 U.S. 479, 497 (1985), noted generally that "RICO is to be read broadly," the case did not involve any issue of proximate cause or standing to pursue RICO claims for remote, indirect, and derivative injuries. Thereafter, in *Holmes*, this Court squarely held that — notwithstanding the "congressional admonition that RICO be 'liberally construed to effectuate its remedial purposes'" — Congress intended to require direct injury in RICO actions. 503 U.S. at 265-68, 274. As

this Court stated, "[a]llowing suits by those injured only indirectly" actually would "'*undermine[ ]* the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *AGC*, 459 U.S. at 545) (emphasis added).*

Second, Petitioners mistakenly assert that the Ninth Circuit based its ruling on a bright-line "Direct Link Test" and (supposedly) treated "almost as an afterthought" a multi-factor remoteness analysis, which Petitioners assert must be applied anew on an *ad hoc* basis in each case. *See* Pet. 19-20. But, to the contrary, the Ninth Circuit stated: "To determine whether an injury is 'too remote' to allow recovery under both the antitrust laws and RICO, a three-factor test is applied ...." App. 176a. The Ninth Circuit explicitly analyzed the "*AGC/Holmes*" "factors" in light of Petitioners' allegations and (following *Oregon Laborers*) concurred with the District Court below that each of these factors "*weighs strongly against* according the [plaintiffs] antitrust and RICO standing." App. 177a-178a (emphasis added). Thus:

- **Speculative nature of the harm.** The Ninth Circuit recognized the difficulty that would be entailed in calculating Petitioners' alleged damages, which would require "considerable speculation regarding how individuals' tobacco usage would have changed in the event that accurate information and less harmful tobacco products were available." App. 179a; *see also, e.g., Laborers Local*, 191 F.3d at 239-40 (describing plaintiffs' alleged

---

* Petitioners further err in contending that the Ninth Circuit's decision conflicts with certain lower court decisions. *See* Pet. 21. For example, in *Israel Travel Advisory*, the Seventh Circuit affirmed the *dismissal* of the plaintiff's RICO claims, concluding that — in light of *Holmes* — "firms suffering derivative injury from business torts" *cannot* resort to RICO. 61 F.3d 1250, 1258 (7th Cir. 1995). And the Seventh Circuit's subsequent decision in *Teamsters* makes clear that in the context of payor/provider cases against the tobacco companies, the Seventh Circuit wholeheartedly *agrees* with the Ninth Circuit decision below. *See* 196 F.3d 818 (7th Cir. 1999).

damages as "incredibly speculative," "the sheerest sort of speculation," and "virtually impossible to determine").*

- **Risk of duplicative recovery / complex apportionment of damages.** The Ninth Circuit recognized that suits by individual smokers pose a risk of duplicative recovery. App. 179a; *see also, e.g., Service Employees*, 249 F.3d at 1075 ("courts would be required to allocate damages among various classes of directly and indirectly injured parties ... in a manner that protects the tobacco industry from being held repeatedly liable for the same alleged wrongdoing"). And as the Ninth Circuit also recognized, the Master Settlement Agreement between certain states and the tobacco companies has "no bearing" on the risk of duplicative recovery from individual smoker suits. App. 179a n.2.

- **Deterring injurious conduct.** The Ninth Circuit recognized that smokers are the "'more direct victims' who can vindicate the public interest in deterring" any injurious conduct by defendants. App. 179a; *see also, e.g., Laborers Local*, 191 F.3d at 241 (actions by smokers will "promote 'the general interest in deterring injurious conduct,' which *Holmes* noted as the objective of this policy factor").**

---

* *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981) (cited at Pet. 25) is inapposite. That case did not involve any issue of directness of injury or proximate cause, but rather the *separate* requirement that a plaintiff must prove damages with requisite certainty to satisfy the requirement of *antitrust injury*.

** In any event, Defendants respectfully submit that *AGC* and *Holmes* do not require that the "factors" discussed therein — which *Holmes* described as "*reasons*" for the "directness of relationship" "*requirement*" (503 U.S. at 269 (emphasis added)) — be applied anew in every case, even in categories of cases in which the principles of proximate causation are long-settled, as they are here. *See* pp. 5-10, *supra*. Although a black-letter rule cannot be announced that would dictate the result in "every case" (as this Court observed in *AGC*, 459 U.S. at 536, and *Holmes*, 503 U.S. at

2. This Court's standing analysis does *not* assume the existence of a "proper plaintiff" for every antitrust or RICO violation. Relying on a reversed district court decision, Petitioners argue that the Ninth Circuit misconstrued the standing analysis of this Court's precedent, which supposedly reflects a "search for [the] proper plaintiffs." Pet. 18. Essentially, Petitioners argue that some plaintiff must always be afforded standing to bring a federal treble damages suit under RICO or the antitrust laws for every violation, no matter how remote, indirect, and derivative the plaintiff's injury.

But *AGC* explicitly rejected any contention that there must always be a plaintiff with standing to bring a federal statutory treble damages suit: "*Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.*" 459 U.S. at 534 (emphasis added); *see also Holmes*, 503 U.S. at 268 (proximate cause is a "judicial tool[ ] used to limit a person's responsibility for the consequences of [his] acts"); *Schlesinger* v. *Reservists Committee*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). Thus, as the D.C. Circuit stated in *reversing* the district court decision on which Petitioners rely:

272, n.20), that does not mean that *no* black-letter rule can ever be announced that would require dismissal in *any* case. For example, it is uniformly settled that a corporate shareholder may not bring a "direct" claim to recover for diminution to the value of his shares occasioned by injury to the corporation. Thus, there is no need in each attempted "direct" suit by a shareholder to engage in a case-by-case analysis of the policy factors; rather, it is well-settled that the shareholder's only recourse lies in bringing a derivative suit on behalf of the corporation. Nor should there be any need to engage in an *ad hoc* review of the policy factors here where another long-settled rule likewise applies to require dismissal, to wit, "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage." *Laborers Local*, 191 F.3d at 237.

> The [plaintiffs] err in assuming that the proximate cause analysis called for by *AGC* and *Holmes* is a quest for the "best" (or, realistically, "least bad") plaintiff. Rather, the Supreme Court has insisted on an appropriate plaintiff, namely, a plaintiff whose alleged injury possesses a sufficiently direct causal relationship to the alleged wrongdoing.

Service Employees, 249 F.3d at 1072.

Ironically, Petitioners also attempt to support their must-always-be-a-plaintiff theory with antitrust cases that establish a rule (the "direct-purchaser" rule) *barring* another species of indirect claims. *See* Pet. 18 (relying on *Hanover Shoe*, 392 U.S. 481 (1968) and *Illinois Brick*, 431 U.S. 720 (1977)). Although the direct-purchaser-rule decisions consider which categories of plaintiffs would have incentive to sue in analyzing antitrust standing, they do not address the separate proximate-cause requirement that this Court subsequently enunciated in *AGC*, and they certainly do *not* suggest that some plaintiff must always have standing no matter how indirect and remote that plaintiff's injury. "The direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of [*AGC*] are analytically distinct." *Teamsters*, 196 F.3d at 828.*

Moreover, Petitioners' theory turns Congressional intent on its head. The inability of those directly injured (*i.e.*, individual smokers) to sue under RICO or the antitrust laws for their health care costs because personal injuries are not injuries to "business or property", *see* pp. 19-20, *infra*, is hardly a point in *favor* of allowing Petitioners — who are

---

* Petitioners further quote a passage from *California* v. *ARC America* that discusses *Illinois Brick*. Pet. 18 (citing 490 U.S. 93, 104 (1989)). *ARC America* itself does not rule on antitrust standing but simply holds that federal antitrust law does not preempt state-law indirect-purchaser statutes, which may allow indirect purchasers to sue under *state* antitrust laws.

only indirectly injured — to sue under these federal statutes for those same injuries. This would flout Congress' policy determination not to permit recovery of personal injury damages, including health care costs, in RICO or antitrust treble damage actions — no matter by whom asserted. *See, e.g., Laborers Local*, 191 F.3d at 241 ("the lack of a RICO damages remedy for even direct personal injuries ... actually weighs heavily *against* RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others") (emphasis added).

In sum, the Ninth Circuit's decision faithfully applies settled principles set forth in this Court's precedents. Review should be denied.

III. THE RICO AND ANTITRUST STANDING ISSUES HAVE *NOT* "DIVIDED COURTS THROUGHOUT THE COUNTRY."

Petitioners' claim that the RICO and antitrust standing issues in this case have "divided courts throughout the country" (Pet. 27-28) is plainly incorrect. Every federal Court of Appeals to have addressed these issues *unanimously* has ruled that health care payors or providers cannot sue tobacco companies under RICO or antitrust law to recoup health care costs allegedly associated with smoking. *See supra* pp. 4-5. Numerous district courts have issued decisions to the same effect.* The district court and state court decisions Petitioners cite either have been reversed or are inapposite:

---

* *See, e.g., Acoma Pueblo* v. *American Tobacco*, No. CIV 99-1049M/WWD, slip op. (D.N.M. July 30, 2001); *Rhode Island Laborers'* v. *Philip Morris*, 99 F. Supp. 2d 174 (D.R.I. 2000); *Arkansas Carpenters'* v. *Philip Morris*, 75 F. Supp. 2d 936 (E.D. Ark. 1999); *Contractors, Laborers* v. *Philip Morris*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999); *Laborers' & Operating Engineers'* v. *Philip Morris*, 42 F. Supp. 2d 943 (D. Ariz. 1999); *Hawaii Health & Welfare Trust Fund* v. *Philip Morris*, 52 F. Supp. 2d 1196 (D. Haw. 1999); *Williams & Drake* v. *American Tobacco*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998);

- The district court decisions in *Service Employees* and *Arkansas Blue Cross* have been *reversed*. *See Service Employees*, 249 F.3d 1068 (D.C. Cir. 2001); *Teamsters*, 196 F.3d 818 (7th Cir. 1999) (reversing *Arkansas Blue Cross*).*

- In *Iron Workers* v. *Philip Morris*, 23 F. Supp. 2d 771 (N.D. Ohio 1998), all federal claims ultimately were *dismissed*. Only an Ohio state-law claim proceeded to trial, and the jury returned a unanimous verdict for the defendants on that claim. *See Iron Workers*, 29 F. Supp. 2d 801 (1998) (granting summary judgment dismissing federal antitrust claims); bench order (Mar. 5, 1999) (directing verdict dismissing RICO claims), order (Mar. 22, 1999) (rendering judgment for defendants upon jury verdict).

- In *Texas* v. *American Tobacco*, 14 F. Supp. 2d 956 (E.D. Tex. 1997), the district court dismissed the state's antitrust claim, but allowed its RICO claim to proceed based on the *state's* assertedly unique quasi-sovereign interests in "protecting the ... populace of the State." *Id.* at 968. But the Fifth Circuit subsequently agreed with other Courts of Appeals that all health care payor or provider claims against the tobacco companies (including RICO claims) must be dismissed. *See Texas Carpenters* v. *Philip Morris*, 199 F.3d 788, 789-90 (5th Cir.

Seafarers Welfare Plan v. *Philip Morris*, 27 F. Supp. 2d 623 (D. Md. 1998); *Southeast Florida Laborers* v. *Philip Morris*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998).

* Yet another argument that Petitioners base on the reversed district court decision in *Service Employees* is that the alleged foreseeability of their harm favors granting them standing. *See* Pet. 25-26. But the D.C. Circuit expressly rejected this argument too in reversing the district court decision: "The circuits have rejected the contention that specific intent ... or the foreseeable nature of the harms alleged is sufficient to satisfy the proximate cause requirement." 249 F.3d at 1074. "'Foreseeability and direct injury (remoteness) are distinct concepts, both of which must generally be established by a plaintiff.'" *Id.* at 1076 (quoting *Laborers Local*, 191 F.3d at 236).

2000). And, in any event, Petitioners here are not states and do not possess quasi-sovereign interests.*

- *Florida* v. *American Tobacco*, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996), "was based upon *Florida's* RICO act, not the federal statute" and upon the state's assertedly special status as a plaintiff. *See Seafarers* v. *Philip Morris*, 27 F. Supp. 2d 623, 632 n.23 (D. Md. 1998) (emphasis added).

- As Petitioners acknowledge (Pet. 28), *Minnesota* v. *Philip Morris*, 551 N.W.2d 490 (Minn. 1996), concerned an assertedly broader Minnesota antitrust statute, not the federal antitrust laws. In dictum, the Minnesota court stated that it would agree with the Seventh Circuit's federal antitrust decision in *Blue Cross & Blue Shield* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995). But the Seventh Circuit itself subsequently held that *Marshfield Clinic* does *not* support standing for third party payors or providers suing tobacco companies. *See Teamsters*, 196 F.3d at 826-27.**

---

* *See, e.g., Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) (quasi-sovereign interests are "a set of interests that the *State* has in the well-being of its *populace*") (emphasis added); *Waller* v. *Florida*, 397 U.S. 387, 392 (1970) (cited *supra*, p. 10 n.*).

** Petitioners also cite the oft-criticized district court decision in *Blue Cross and Blue Shield of N.J.* v. *Philip Morris*, 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999) (Weinstein, J.). *See* Pet. 12. However, *Blue Cross* is inconsistent with all of the Court of Appeals decisions, including the *Laborers Local* decision in the Second Circuit. Indeed, the Seventh Circuit "disapproved" the *Blue Cross* decision, stating that it "fails to anticipate the second circuit's conclusion in *Laborers Local*" and that the amended version of the decision is "a thinly disguised refusal to accept and follow the second circuit's holding" in *Laborers Local*. *See Teamsters*, 196 F.3d at 827. Other courts likewise have criticized the *New Jersey Blue Cross* decisions. *See, e.g., Allegheny Gen. Hosp.*, 228 F.3d at 436 n.5, 444-45, 445 n.11; *Rhode Island Laborers'* v. *Philip Morris*, 99 F. Supp. 2d 174, 177-78 (D.R.I. 2000).

Finally, there is no "practical conflict" between the Ninth Circuit's decision and the tobacco companies' settlement of cases brought by state attorneys general. *See* Pet. 29. Among other things, the Hospital Districts are not state governments. Petitioners quote the Third Circuit's decision in *Steamfitters* as noting an "arguabl[e] ... tension" between its decision and the state settlement, but fail to quote the Third Circuit's subsequent statement that "an explanation for th[is] putative tension may be found in any number of places." *See* Pet. 29 n.11; *Steamfitters*, 171 F.3d at 934 n.18. In any event, a purported "practical conflict" between the Ninth Circuit's decision and a *settlement* of other cases could not possibly justify this Court's certiorari review.

IV. INDEPENDENT GROUNDS WOULD JUSTIFY AFFIRMING THE DECISION BELOW

Review of the Ninth Circuit decision below is further unwarranted because there exist multiple grounds for affirming the decision, and review would not lead to reversal. The following are among the alternative grounds for affirmance:

1. Petitioners' RICO and antitrust claims are barred not only because they are impermissibly remote but also because health care costs occasioned by personal injuries are not injury to "business or property." 15 U.S.C. § 15; 18 U.S.C. § 1964(c); *see also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The health care costs the Hospital Districts seek to recover are an integral component of their patients' personal injury claims (*see, e.g., Metro-North* v. *Buckley*, 521 U.S. 424, 438-39 (1997); 2 Dobbs, *Law of Remedies* §§ 8.1(1), (3) (2d ed. 1993)), and accordingly do not constitute "business or property" injury. *See, e.g., Laborers Local*, 191 F.3d at 241; *Oregon Laborers*, 185 F.3d at 964, 968; App. 183a-184a. To permit third-party payors or providers to characterize the costs of treating personal injuries allegedly inflicted upon others as "business or property" injury to themselves would sanction a form of legal

alchemy that would permit state-law claims for personal injuries to be transformed into federal antitrust and RICO treble damages claims, simply because some third person paid for or provided the injured person's health care. There is no basis for such a result.

2. As the Ninth Circuit held, Petitioners' antitrust claims fail because they do not allege "antitrust injury," which requires "the plaintiff to have suffered its injury in the market where competition is being restrained." App. 182a (internal quotation marks omitted). The Hospital Districts allege that they were potential participants in the "nicotine delivery market" and that defendants illegally restrained that market. *See* App. 113a, 182a. But even if those allegations were credited, the *injury* the Hospital Districts suffered from the alleged restraint — increased health care costs — occurred in the *health care* market, not in the "nicotine delivery market." Thus, Petitioners did not suffer antitrust injury. App. 182a; *see also Oregon Laborers*, 185 F.3d at 966-67; *Teamsters*, 196 F.3d at 825.

Petitioners' reliance upon *Blue Shield* v. *McCready*, 457 U.S. 465 (1982) (*see* Pet. 26-27), is unavailing. In *McCready*, defendants allegedly restrained the market for psychotherapy services, and it was in *that same market* that the plaintiffs — consumers of psychotherapy services — suffered injury. Moreover, as the Ninth Circuit and other Courts of Appeals correctly have held, *McCready* does not support health care payors or providers' attempts to recover for their alleged indirect harm since (as this Court noted in *AGC*, 459 U.S. at 540 n.44) the plaintiff in *McCready* was *directly* injured as a participant (buyer) in the market for psychotherapy services. *See, e.g.*, App. 180a-181a; *Allegheny Gen. Hosp.*, 228 F.3d at 438 ("proximate cause and standing for the Hospitals' antitrust claims do not exist under *McCready*").*

* In addition, as a matter of law, Petitioners cannot plead justifiable reliance on defendants' allegedly misleading statements. Court after court has recognized that the health risks associated with smoking are a matter

V. CERTIORARI IS INAPPROPRIATE IN ANY EVENT AS TO PETITIONERS' STATE-LAW CLAIMS.

The substance of the Petition, and its Questions Presented, relate exclusively to Petitioners' federal RICO and antitrust claims. But in a footnote, Petitioners claim that they also "seek certiorari and reversal of the Ninth Circuit Decision on proximate cause as it relates to *all* of their claims" — an apparent reference to Petitioners' Washington state-law claims. *See* Pet. 7 n.2 (emphasis added).

There is no basis for this Court to grant certiorari review of the dismissal of Petitioners' state-law claims. Since Petitioners failed to include the state-law claims within the scope of their questions presented (and failed to present any argument as to the certworthiness of those claims), the Court should not consider them. *See, e.g.*, Supreme Court Rule 14.1(a); *Izumi Seimitsu* v. *U.S. Philips Corp.*, 510 U.S. 27, 30-32 & n.5 (1993). Beyond this procedural defect, Petitioners' arguments for certiorari — such as the asserted importance of the RICO and antitrust issues and purported conflicts with other decisions — simply do not apply to Petitioners' Washington state-law claims. And, in any event, the courts below properly rejected these claims. *See* App. 163a-168a, 183a-187a.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

---

of long-standing common knowledge. *See, e.g., FDA* v. *Brown & Williamson*, 529 U.S. 120, 137-40 (2000); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996). Plaintiffs here are *hospital* districts that assertedly "research, fund and promote wellness and health lifestyle programs." App. 16a. The Hospital Districts' access to the body of knowledge regarding risks associated with smoking precludes them from claiming they were deceived by defendants. *See Teamsters*, 196 F.3d at 826.

August 20, 2001

Respectfully submitted,

Herbert M. Wachtell
Counsel of Record
Peter C. Hein
Michael A. Charish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019

John W. Phillips
Leonard J. Feldman
Judith H. Ramseyer
HELLER EHRMAN WHITE
& MCAULIFFE LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104

Attorneys for Respondent
Philip Morris Incorporated

Bradley S. Keller
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

H. Joseph Escher, III
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, California 94111

Attorneys for Respondent
R.J. Reynolds Tobacco

John A. Tondini
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Jeffrey Davidson
Tony L. Richardson
KIRKLAND & ELLIS
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Respondent Brown & Williamson Tobacco Corp.

Christopher W. Tompkins
BETTS PATTERSON & MINES, P.S.
1215 Fourth Avenue, Suite 800
Seattle, Washington 98161

David W. Smith
Tina M. Schaefer
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Respondent Lorillard Tobacco Company

Jay R. Henneberry
Susan St. Denis
CHÀDBOURNE & PARKE LLP
350 South Grand Avenue, Suite 3300
Los Angeles, California 90071

Thomas R. Merrick
BULLIVANT HOUSER BAILEY PC
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Attorneys for Respondent
British American Tobacco
(Investments) Limited

Peter J. McKenna
Eric S. Sarner
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
Four Times Square
New York, New York 10036

Attorneys for Respondent
U.S. Smokeless Tobacco Company

John D. Wilson
David M. Jacobi
WILSON SMITH COCHRAN
& DICKERSON
1215 Fourth Avenue, #1700
Seattle, Washington 98161-1007

Attorneys for Respondent
Smokeless Tobacco Council, Inc.

James R. Murray
Franklin D. Cordell
GORDON MURRAY TILDEN
1325 Fourth Avenue, #1800
Seattle, Washington 98101

Attorneys for Respondent
The Tobacco Institute, Inc.

Bruce G. Merritt
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, New York 10022

Attorneys for Respondent
The Council for Tobacco Research
U.S.A., Inc.

Thomas J. Brewer
The Exchange Building, Suite 2000
821 Second Avenue
Seattle, Washington 98104

Attorney for Respondent
Hill and Knowlton, Inc.